No. 2258

United States
Circuit Court of Appeals
For the Ninth Circuit

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record

Upon Writ of Error from the United States District Court for the Eastern District of Washington Northern Division

SHAW & BORDEN CO. 138008

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INDEX.

INDEX.

INDEX.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

Defendant.

ADDRESSES AND NAMES OF ATTORNEYS OF RECORD.

GRAVES, KIZER & GRAVES, Old National Bank Building, Spokane, Washington,

Attorneys for Plaintiff in Error.

OSCAR CAIN, United States District Attorney for the Eastern District of Washington, Federal Building, Spokane, Washington,

PHILIP J. DOHERTY, Special Assistant to the United States District Attorney, Washington, D. C., and

EDMUND J. FARLEY, Assistant United States Attorney, Federal Building, Spokane, Washington,

Attorneys for Defendant in Error.

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

Defendant.

COMPLAINT.

Now comes the United States of America, by Oscar Cain, United States Attorney for the Eastern District of Washington, and brings this action on behalf of the United States against the Spokane & Inland Empire Railroad Company, a corporation organized and doing business under the laws of the State of Washington, and having an office and place of business at Spokane, in the State of Washington; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved

April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 304, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane, in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A SECOND CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2,

1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 303, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A THIRD CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 contained in 32 (Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line

of railroad one car, to-wit: I. E. S. 305, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A FOURTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 63, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A FIFTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 17, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of

railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A SIXTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 65, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the

grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars

FOR A SEVENTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 300, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not

provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR AN EIGHTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 30, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the sides of said car, and when said sides of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as

required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A NINTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 18, which line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A TENTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 10, which said line of railroad was at said time a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the vio-

lation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR AN ELEVENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 12, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab iron or handhold was missing from the side of the car near "A" end of said car, and when said side of said car was not provided with secure grab irons or handholds for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A TWELFTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85) and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 27, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A THIRTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was

during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 10, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling appartus on the "A" end of said car consisted of what is known as the link and pin coupler, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended,

defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A FOURTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 50, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as a link and pin coupler, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as

required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A FIFTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act Approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 4, which said line of railroad at said time was a highway of interstate commerce;

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as a link and pin coupler, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped

with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1, of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of fifteen hundred dollars and its costs herein expended.

(Signed) OSCAR CAIN,
United States Attorney.

Endorsements: Complaint. Filed January 3, 1912. W .H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation,
Defendant.

ANSWER.

Defendant makes the following answer to the complaint of plaintiff:

I.

Answering the first cause of action set forth in the complaint of plaintiff, defendant admits that it is

and was during all the times mentioned in said complaint, a common carrier, engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 304, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said first cause of action alleged, which has not been herein specifically admitted.

II.

Answering the second cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington, that on October 23rd, 1911, it hauled on its said line of electric railway, one car, to-wit: I. E. S. 303, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said second cause of action alleged, which has not been herein specifically admitted.

III.

Answering the third cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit:

I. E. S. 305, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said third cause of action alleged, which has not been herein specifically admitted.

IV.

Answering the fourth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 63, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said fourth cause of action alleged, which has not been herein specifically admitted.

V.

Answering the fifth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 17, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said fifth cause of action, alleged, which has not been herein specifically admitted.

VI.

Answering the sixth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 65, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said sixth cause of action alleged, which has not been herein specifically admitted.

VII.

Answering the seventh cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 300, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said seventh cause of action alleged, which has not been herein specifically admitted.

VIII.

Answering the eighth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the time mentioned in said complaint, a common carrier engaged in interstate

commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 30, which said line of electric railway was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said eighth cause of action alleged, which has not been herein specifically admitted.

IX.

Answering the ninth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 18, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said ninth cause of action alleged, which has not been herein specifically admitted.

X.

Answering the tenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 10, which said line of electric railway at said time was a highway of interstate

commerce; and defendant denies each and every allegation, matter and thing in said tenth cause of action alleged, which has not been herein specifically admitted.

XI.

Answering the eleventh cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 12, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said eleventh cause of action alleged, which has not been herein specifically admitted.

XII.

Answering the twelfth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 27, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said twelfth cause of action alleged, which has not been herein specifically admitted.

XIII.

Answering the thirteenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 10, which said line of electric railway at said time was a highway of interstate commerce; and defendant further admits that on said date it hauled said car over its line of electric railway easterly from Spokane, in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as the link and pin coupler, and when said car was not equipped with couplers coupling automatically by impact, and defendant denies each and every allegation, matter and thing in said thirteenth cause of action alleged, which has not been herein specifically admitted.

XIV.

Answering the fourteenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 50, which said line of electric railway at said time was a highway of interstate commerce;

and defendant further admits that on said date it hauled said car over its line of electric railway easterly from Spokane, in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as the link and pin coupler, and when said car was not equipped with couplers coupling automatically by impact, and defendant denies each and every allegation, matter and thing in said fourteenth cause of action alleged, which has not been herein specifically admitted.

XV.

Answering the fifteenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 4, which said line of electric railway at said time was a highway of interstate commerce; and defendant further admits that on said date it hauled said car over its line of electric railway easterly from Spokane, in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as the link and pin coupler, and when said car was not equipped with couplers coupling automatically by impact, and defendant denies each and every allegation, matter and thing in said fifteenth cause of action alleged, which has not been herein specifically admitted.

FURTHER ANSWERING the complaint of the plaintiff, and for an AFFIRMATIVE DEFENSE to each and every cause of action pleaded therein, this defendant alleges that each and every car referred to in each of the said several causes of action, has been at all times and was on the dates set forth in the complaint of plaintiff, used by this defendant upon its line of street railway.

WHEREFORE, having fully answered the complaint of plaintiff, defendant demands judgment against the plaintiff; that this action against it be dismissed; that it go hence without day and recover of the plaintiff its costs.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

State of Washington
County of Spokane,—ss.

W. G. Davidson, being first duly sworn, on oath deposes and says: that he is one of the officers of the Spokane & Inland Empire Railroad Company, a corporation, defendant above named, to-wit: its secretary, and as such officer makes this verification for and on behalf of said corporation; that he has read the above and foregoing answer, knows the contents thereof and believes the same to be true.

(Signed) W. G. DAVIDSON.

Subscribed and sworn to before me this 24th day of January, 1912.

(Signed) C. H. SCHWELLENBACH,
Notary Public in and for the State of Washington, residing at Spokane.

(Notarial Seal)

Endorsements: Service of the within answer is hereby acknowledged this 24th day of January, 1912. OSCAR CAIN, U. S. Attorney and Attorney for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington, March 11, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

Defendant.

REPLY.

Comes now the United States of America, and for reply to the affirmative defense of the defendant to each and every cause of action in the complaint herein, denies each and every allegation, matter and thing contained in said affirmative defenses and each of them.

(Signed) OSCAR CAIN,
United States Attorney.

(Signed) E. C. MACDONALD,
Assistant United States Attorney.

Endorsements: Reply. Filed February 10, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury in the above-entitled cause, find the defendant guilty of the violation of the Safety Appliance Act as charged in counts numbered thirteen, fourteen and fifteen of the complaint and guilty as to counts from one to twelve inclusive.

(Signed) W. H. COCHRAN,
Foreman.

Endorsements: Verdict. Filed April 18th, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation,

Defendant.

MOTION FOR JUDGMENT.

Defendant moves the Court to enter judgment in its favor, dismissing the action, and for costs, not-

withstanding the verdict returned herein by the jury, for the reason that said verdict is contrary to law and to the undisputed evidence in the case, and under the law and the facts defendant is entitled to judgment, as herein dmanded.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of the within motion for judgment is hereby acknowledged this_____day of April, 1912.

(Signed) OSCAR CAIN,
Attorney for Plaintiff.

Motion for judgment. Filed April 18, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
Defendant.

OPINION.

Oscar Cain, U. S. Atty.
E. C. Macdonald, Asst. U. S. Atty.
Philip J. Doherty, Special Asst. to U. S. Atty.
Graves, Kizer & Graves, for defendant.

RUDKIN, District Judge. The present action was instituted by the United States Attorney for this district upon the suggestion of The Attorney General

of the Uniied States, and at the request of the Interstate Commerce Commission, to recover penalties for violations of the Safety Appliance Act of March 2, 1893, as amended by the Acts approved April 1, 1896 and March 2, 1903 (27 Stat., 531; 29 Stat., 85; 32 Stat., 943).

The complaint contains fifteen causes of action in all, the first twelve for using in interstate commerce certain cars which were not provided with secure grab irons or handholds in the ends and sides of the cars for greater security of men in coupling and uncoupling the cars as required by section four of the Act, and the last three for permitting the hauling and using in interstate commerce of cars not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of men going between the ends of the cars as required by section two. The jury returned a verdict of guilty under the testimony as to the first twelve causes of action and a like verdict, by direction of the Court, as to the remaining three causes of action, and the defendant has interposed a motion for judgment notwithstanding the verdict. The sole ground of the motion is, that the cars in question were used upon street railways, within the meaning of the exception or saving clause embodied in the amendment of 1903, which exempts from the provisions of the act certain cars exempted by a prior amendment "or which are used upon street railways."

32 Stat., 943, *supra.*

The claims of the respective parties may be thus briefly stated. The government contends that the saving clause excludes from the operation of the act only such cars as are used exclusively on street railways, or what might be styled street cars proper, while the defendant contends that all cars which are habitually operated over street railways are excluded, even though they are so oprated for a small part of their journey only. This latter construction would, of course, exclude from the operation of the act practically all interurban trains, for it is conceded that such trains are usually, if not uniformly, operated over the street railways in the cities between which or through which they run. For the purpose of this opinion it would perhaps be a sufficiently definite description of the defendant's railway system to say that it differs in no respect from the interurban railways operated so extensively throughout the country. The company owns and operates a street railway system in the city of Spokane, and two or more interurban lines, one of which extends from the city of Spokane, in the State of Washington, to Coeur d'Alene city, in the State of Idaho, and is engaged in interstate commerce. The cars in question were hauled over this latter line. The passenger depot is in the heart of the city of Spokane and passenger trains run from this depot over the street railway tracks to the private right-of-way of the company, a distance of a mile or more. From the latter point the trains run over the company's private right-of-way to Coeur d'Alene city, a distance of about thirty miles.

The cars differ little from the passenger coaches in common use on all commercial railways. They are usually operated in trains and run at a high rate of speed. The trains run on schedule time and their movement is controlled by train dispatchers and telegraphic orders in the customary way. Trains take up passengers at different points within the city destined to points without the city and discharge passengers at different points within the city from points without the city, but carry no passengers between points within the city. The trains carry baggage as well as passengers, and freight trains are operated over the private right-of-way, but not as a rule on the street railway tracks. The cars mentioned in the first twelve causes of action were the interurban cars in common use, while the cars mentioned in the last three causes of action were ordinary street cars, chained together and used on the interurban line in an emergency. For the purpose of the present motion it must be assumed that the first twelve cars were not provided with the grab irons or handholds required by the statute, and it is admitted that the last three cars were not equipped with automatic couplers. The object of the Safety Appliance Act is to protect those engaged in hazardous occupations in which thousands of men are annually maimed and killed, and there is nothing in the record to indicate that there is less hazard in the operation of an interurban train than any other. Indeed, the chief difference between the interurban train of the present day and the train operated over the steam

railway lies in the motive power. Nor has any satisfactory reason been suggested why interurban roads can not readily comply with all the requirements of the Safety Appliance Act, or why trains so equipped can not operate over street railways, if need be. True, the grab irons or handholds cannot be places beneath the cars now in use, as required by the order of the Interstate Commerce Commission made pursuant to the Act of Congress of April 14, 1910 (36 Stat., 298) because the long swing of the draw bar in turning street cars will either break the handholds or grab irons from the car or throw the car from the track. But the order in question was not in force at the time of the use of the cars here complained of, and it is not to be presumed that the Interstate Commerce Commission will make regulations which are either unreasonable or unnecessary; and if it has done so, it is not to be presumed that it will refuse to modify such regulations on proper application and showing. In any event, a regulation made by the Interstate Commerce Commission under an Act passed in 1910, can have but little bearing on the construction of an Act passed in 1903. It was urged in argument that a great many interurban railways were under construction at the time of the passage of the Act of 1903 and that Congress had such roads in view when it employed the expression, "used on street railways." It seems to me that if Congress had such roads in mind it would have described them more definitely than by referring to a mere incident to their main or principal use. The term "used"

means "employed for a purpose," and imports a certain degree of permanence.

Section seven of the Act of Congress of March 3, 1851, entitled, "An Act to limit the liability of ship owners and for other purposes," contained the following exception or saving clause.

"This Act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatever, used in rivers or inland navigation."

And in construing the term "used" in Moore v. American Transportation Company, 24 How., 1, the Court said:

"This word *used* means, in the connection found, *employed,* and doubtless, in the mind of Congress, was intended to refer to vessels solely employed in rivers or inland navigation."

So here, Congress intended to exclude from the operation of the Act such cars only as are used solely on street railways. This construction is reasonable and none too liberal. The exception or saving clause must be construed strictly and no other construction will give full effect to the objects and purposes which Congress had in view. The first twelve cars mentioned in the complaint were therefore not used on street railways within the meaning of the law, and it is needless to say that street cars cannot lawfully be chained together and used for the purpose of carrying passengers in interstate commerce.

The motion for judgment notwithstanding the verdict is denied.

Endorsements: Opinion denying Motion for Judgment notwithstanding the Verdict. Filed in the U. S. District Court, Eastern District of Washington, September 16, 1912. W. H. Hare, Clerk.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Defendant.

PETITION FOR A NEW TRIAL.

Defendant prays the Court to grant it a new trial in the above-entitled action for the following causes:

1. Insufficiency of the evidence to justify the verdict returned herein. The evidence was insufficient to justify the verdict for the reasons:

(a) That it appears that the cars referred to in plaintiff's complaint and in the evidence herein were cars which are used upon a street car line, and being so used do not come within the operation of the Act of Congress relied upon, and on account of the alleged violation of which recovery was sought herein.

(b) That it appears that the hand-holds, or grab-irons in the buffer or sill at the ends of such cars were sufficient within the meaning of the Act of Congress relied upon, and that if the cars do come within the purview of such act, there was no viola-

tion thereof because the appliances above referred to were sufficient.

2. Error in law occurring at the trial and excepted to at the time by the defendant. The particular errors relied upon are:

(a) The exclusion of the testimony of skilled and experienced railway men who had examined the cars in question and of whom plaintiff inquired as to the sufficiency of the hand-holds in the buffers or sills of such cars.

(b) Rejecting defendant's offer to prove by skilled and experienced railway men who had examined the cars in question that the hand-holds or grab-irons in the buffers or sills of such cars were sufficient to accomplish the purpose intended to be accomplished by the provisions of the act, and better than those commonly in use upon the cars used in interstate commerce.

(c) In denying defendant's motion for a nonsuit.

(d) In denying defendant's motion to instruct the jury to return a verdict in defendant's favor.

(e) In instructing the jury to return a verdict of guilty against the defendant on the last three counts of the complaint.

This petition is based and will be heard upon the pleadings herein, upon the record of the Court, of the minutes of the Court, and the bill of exceptions prepared by defendant.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of within petition for new trial is hereby acknowledged this 10th day of October, 1912.

(Signed) OSCAR CAIN,
United States Attorney.

Petition for New Trial. Filed October 10, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
Defendant.

OPINION.

Oscar Cain, U. S. Atty.
E. C. Macdonald, Asst. U. S. Atty.
Philip J. Doherty, Special Asst. to the U. S. Atty.
Graves, Kizer & Graves, for defendant.

RUDKIN, District Judge. The defendant has interposed a motion for a new trial in this case, and a proper understanding of the question thus presented calls for a somewhat more extended statement of the facts than is contained in my former opinion. As there stated, the first twelve causes of action are based on the use of certain cars in interstate commerce which were not provided with secure grab-irons or hand-holds in the ends and sides of the

cars for the greater security of men in coupling and uncoupling cars, as required by section four of the Safety Appliance Act. That which the defendant claims served the purpose of hand-holds or grab-irons and satisfied the requirements of the statute may be thus described. The end of the interurban car in question is circular in form so that the trains may turn street corners while operating on the city streets. The iron base of the car extends a few inches beyond the body of the car itself and is six or seven inches in depth though not entirely solid. On either side of the draw-bar there is an opening in this angle iron approximately twenty inches in length and two inches in width, leaving an iron plate or bar two or three inches in width in front of the opening. These openings, the defendant contends, constitute sufficient hand-holds or grab-irons to comply with the requirements of the statute. On the foregoing facts the defendant called a number of experienced railroad men as witnesses and offered to prove by them that the openings in the angle iron were as safe and serviceable as the hand-holds or grab-irons in common use on commercial railways. An objection interposed to this offer was sustained by the Court and that ruling is the only error assigned at this time.

The purpose of the hand-hold is obvious. As declared by the statute, it is for the greater security of men in coupling and uncoupling cars. In order to subserve that purpose it must be located at the proper place; it must be located so that it can be seen, and it must be of such form and size that it

can be readily seized in an emergency. Whether it satisfies these requirements is not, in my opinion, a matter for experts to determine, but is within the common knowledge of all men of ordinary intelligence. It would be idle to attempt to review the wilderness of authority bearing upon this question and I will not attempt it, for, as said by the Court in Graham v. Pennsylvania Company, 139 Pa. St., 149, the number of such decisions "may be said not only to have become legion, but legion against legion." The question in every case is addressed to the sound discretion of the court, and, except in cases of necessity, witnesses should not be permitted to express an opinion upon the main issue in the case. To do so is a plain invasion of the province of the jury. The jury in this case heard the testimony and by consent of parties viewed and inspected the so-called hand-holds in question as well as the hand-holds in use on one of the steam railways passing through the city; and from such view in the light of the testimony they were better able to determine the issue correctly than if it had been clouded and obscured by the biased opinions of partisan experts.

The motion for new trial is denied.

Endorsements: Opinion Denying Motion for New Trial. Filed October 31, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

Defendant.

JUDGMENT.

The above-entitled cause having come on for trial on the 17th day of April, A. D. 1912, the plaintiff appearing and being represented by Philip J. Doherty, Esquire, Special Assistant United States Attorney, and Oscar Cain, United States Attorney for the Eastern District of Washington; the defendant, Spokane & Inland Empire Railroad Company, appearing and being represented by Graves, Kizer & Graves, its attorneys, and a jury having been duly and regularly impaneled, the case proceeded to trial, witnesses examined on behalf of the parties hereto, and the Court having listened to the argument of counsel for the respective parties, and having directed a verdict for the plaintiff as to counts 13, 14 and 15, and having submitted to the jury the matters contained in counts 1 to 12 inclusive, of the complaint filed herein, a verdict of guilty was returned, whereupon a motion for judgment *non obstante veredicto* was filed by the defendant, which motion was denied by the Court on September 17th, 1912, whereupon the defendant filed its motion for a new trial, the

same having come on for argument before the Court on the 30th day of October, 1912, and taken under advisement, and the Court having filed on the 31st day of October, 1912, his decision denying said action; it is therefore,

ORDERED and ADJUDGED that the defendant Spokane & Inland Empire Railroad Company be, and the same is hereby fined in the sum of Fifteen Hundred ($1500.00) Dollars, being One Hundred ($100.00 Dollars for each cause of action set forth in the complaint; and it is further

ORDERED and ADJUDGED that the plaintiff, United States of America, do have and recover of and from the defendant, Spokane & Inland Empire Railroad Company, its costs and disbursements herein to be taxed.

Done in open Court this 2nd day of November, A. D. 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Judgment. Filed November 2, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

Defendant.

ORDER EXTENDING TIME.

The time for moving for a new trial and for filing the bill of exceptions is extended until June 1, 1912, and either party hereto may file a bill of exceptions herein on or before that date.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order Extending Time. Filed April 20th, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation,

Defendant.

STIPULATION.

IT IS STIPULATED that the defendant may have until August 1, 1912, to petition for a new trial herein, and that either party may have until

that time in order to prepare and file a bill of exceptions herein, and that an order accordingly may be entered.

Dated this 31st day of May, 1912.

(Signed) OSCAR CAIN,
Attorney for Plaintiff.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Stipulation. Filed June 1, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation,
Defendant.

ORDER.

Upon the stipulation of the parties, it is ordered that either party shall have until August 1, 1912, within which to prepare and file a bill of exceptions herein, and that the defendant shall have until that time within which to present its petition for a new trial, should it be so advised.

Done in open Court this 31st day of May, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Order. Filed June 1, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

Defendant.

STIPULATION.

It is stipulated between the parties hereto that the time of filing the petition for a new trial, of filing the bill of exceptions and for the Court to decide and pass upon the motion for judgment *non obstante veredicto,* and the motion for a new trial if the motion for judgment *non obstante veredicto* is denied, be continued over the term until November 1, 1912.

(Signed) OSCAR CAIN,

U. S. District Attorney.

(Signed) GRAVES, KIZER & GRAVES,

Attorneys for Defendant.

Endorsements: Stipulation. Filed August 29, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

Defendant.

ORDER.

Upon the stipulation of the parties hereto, it is ordered that the time for filing the petition for a new trial herein, the time for filing a bill of exceptions and the time in which the Court may consider and pass upon the motion for judgment *non obstante veredicto* now pending before it, shall be and hereby are continued over the term and until November 1, 1912; and that whatever the ruling upon the motion for judgment *non obstante veredicto* the other steps heretofore referred to may be taken before that time.

Done in open Court this 29th day of August, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order. Filed August 29, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

Defendant.

ORDER.

It is ORDERED that the defendant shall have until January 1, 1913, within which to prepare and file a bill of exceptions in the above-entitled cause.

Dated October 18, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order. Filed October 19, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above entitled cause came on for hearing in the above entitled Court on Wednesday, April 27, 1912, before the Honorable

F. H. Rudkin, judge presiding, plaintiff being represented by its attorneys, Oscar Cain, district attorney, and Philip J. Doherty, Esq., and the defendant being represented by its attorneys, Graves, Kizer & Graves, and the following proceedings were had, to-wit:

The jury was empaneled and sworn according to law, and thereupon the plaintiff, to sustain the issue upon its part, offered the testimony of the following witnesses as its evidence in chief:

GEORGE B. WINTER, being duly sworn, testified as follows:

"I am a safety appliance inspector for the Interstate Commerce Commission, and on October 23, 1911, made an inspection of the cars of the Spokane & Inland Empire Railroad Company in Spokane. I inspected passenger coach 304, and found that both end handholds on both ends of the car were missing. I mean by hand-holds what are commonly known by railroad men as grab-irons. .They are placed usually on the end sill of the car for the protection of the men in coupling and uncoupling hose. It is customary to have four hand-holds, one on each side of the coupler, and two on each end, and these were all missing. This was a passenger car in a train with other cars. At this point it was admitted that the train in which this car was placed was destined for Coeur d'Alene, Idaho, and was run through to that place; that it was run outside of the city limits of Spokane over the private right of way of the Spokane & Inland Empire Railroad Company, over a highway of Interstate Commerce. It was also admitted that the car

and the train in which it was was run from the passenger station in Spokane through the streets of that city over the street railway lines of the company to the point where the private right of way of the company was reached and from there it was run on such private right of way to Coeur d'Alene.) I examined that car afterwards at Allan, Idaho, and it was in the same condition at that time. (It was admitted by defendant that the other cars referred to in the first twelve counts of the complaint were in the same condition with respect to hand-holds as was car 304 concerning which the witness testified, and that it was unnecessary to produce testimony as to each of the twelve cars). Coming to count 13 of the complaint, I examined three cars in train extra No. 4 of the Spokane & Inland Empire Railroad Company. Motor and coach No. 4 and coach No. 50, and Motor and coach No. 10 had what are commonly known as link and pin couplings. In order to couple these cars, it would be necessary for a man to go between them and use the link and pin. I rode on this train to Allan, Idaho. It was a passenger train. (Defendant admitted that the same condition was true as to the cars referred to in the last two counts of the complaint.) The trains of defendant company leave from the depot in the city and the motor car or motor and baggage was the first car. Then the other cars, whether there were two or three, were coupled to it in consecutive order. These trains went out over the street-car tracks. They are operated by train orders and made up with markers, as required

by the standard rules. Some of them handle baggage and express. Freight is handled over the line in freight cars. In going out from the terminal station in Spokane, these trains go eastward over one of the main thoroughfares of the city, and run by the brewery and the Northern Pacific round house, across two Spokane river bridges, and then parallel to the Northern Pacific towards Coeur d'Alene. I believe that route is the direct route out of the terminal station. It might be considered so.

CROSS-EXAMINATION.

The cars handling freight are not brought down to the passenger station over the city streets. They stop at the freight terminals, and the cars handling freight are not run over the street railway line. This road is an electric railroad operated by trolley cars, and the cars are run from the yards of the company over street railway lines through the streets of the City of Spokane from the freight yards of the company down to the passenger station. They are operated over street railway lines, tracks laid in the street over which street railway cars run. The front of the cars which I inspected were constructed in a different manner from that of cars used on the steam railroads, due to the curvature, necessitating the car going around street angles. There is a radial coupler and a heavy steel sill that is round on the corners. That radial coupler swings from one side to the other across the whole front of the car. It is necessary that it should do so, and that the corners should be rounded so that the cars can make the turns on

the street railway lines. The cars used on steam railroads are practically square. The sill or buffer under which the coupler swings is not found on steam cars. In that buffer or sill on each side of the coupler, measuring from 18 to 22 inches in length and from 2¼ to 3 inches of clearance, and about 25 or 26 inches from the center of the car, is an opening. There was such an opening on each side of the coupler. Those openings were on each end of all the coaches and most of the motors. The baggage and mail car has a solid sill, but on all the coaches and motor-cars used for passenger business I found those openings. I observed the cars that I have referred to and which were not equipped with the automatic coupler. They were ordinary traction cars, small in construction. I would consider it a street car. It would be impossible to equip such a car with automatic couplers." (Thereupon it was admitted that all of the cars referred to in the complaint moved on the day alleged in the complaint, and that inspector Hayes, if called, would testify as to the condition of the cars in all respects, both upon direct and cross-examination, as inspector Winter had testified).

Thereupon the plaintiff rested, and the defendant to sustain the issues upon its part then offered the testimony of the following witnesses as its evidence in chief.

W. C. MOCK, being duly sworn, testified as follows:

"I am the resident engineer of the Spokane & Inland Empire Railroad Company. The cars of that

company in coming down from its freight yards to its passenger station are obliged to pass around a number of curves in the street. At Market street there is about a 36 degree curve. At the corner of Market and Main, where the street railway line turns from Market street into Main, there is a 73 degree curve. At the passenger station where the line turns from Main avenue into Lincoln street, there is practically a 100 degree curve. The maximum curve used on steam railways does not go much over a 4 degree curve, though on difficult construction a 10 degree to 14 degree curve is used, but that is the limit, while on the street railway line over which these cars are running to and from the freight yards down to the passenger station, you get from a 36 degree curve up to 100 degrees. The coupler that is used on these cars swings clear across the car from one side to another under the end sill or buffer of the car. It is necessary that it should be made to so swing because of the extremely short curves on the city streets going into the passenger station. Over the top of the buffer is an angle iron, 3½ inches wide and 9 inches high, and of half inch material, that extends across the end of the car. On either side of the coupler there is an opening in this angle iron which is 22½ inches long and 2½ inches wide and is back 3½ inches from the front of the buffer."

CROSS-EXAMINATION.

"The cars were not made according to my designs, and I do not know whether the openings were constructed for any particular purpose. All the passen-

ger coaches were uniformly equipped, as I have stated. There are no solid sills on passenger coaches, though there are on motors, motors and baggage cars which are sometimes used in passenger trains."

EDWARD E. LILLIE, being duly sworn, testified as follows:

"I am the superintendent of the defendant company in charge of its interurban system. I have been engaged in railroad work for 29 years in positions from telegraph operator to superintendent. The lines of the defendant company are operated by electricity. One line extends from Spokane to Coeur d'Alene, and then to Hayden Lake, Idaho. Another line from Spokane to Moscow, Idaho, and a third one from Spring Valley to Colfax, both in Washington. The company owns the city lines known as the Spokane Traction Company within the city limits, and one suburban line running out to Opportunity. Its passenger station is located at the corner of Main and Lincoln, very close to the center of the business part of the city. From the freight yards of the company, the passenger station is reached by all interurban trains by leaving the freight yards where they intersect Market street, using Market street to Main avenue, Main avenue to Lincoln, and Lincoln into the depot. The curves of the street railway lines on these streets are very abrupt, and it would not be possible to have them otherwise under the city ordinances. In making these curves, the coupler swings for almost the entire turn from one side of the car to the other, and so makes the turn in the streets. The

radial coupler is below, and not attached to the buffer or sill that has been spoken of. There is an iron below the buffer which sustains that radial coupler. It would not be possible to use these cars on the street railway lines over the city streets if the hand-holds or grab-irons were put below the buffer because the swing of the draw-bar, in turning the curves, would break them off. Prior to the act giving the Interstate Commerce Commission power to prescribe uniform systems of safety appliances, there was no uniformity in the grab-irons, or hand-holds, that were placed upon cars. Some put grab-irons on in one place, and some in another. But there was no uniformity with respect to their use, location, or anything of that sort. In the top of the buffer on these cars there is an opening in the angle iron about 22 inches long, 2 or 3 inches wide, and set back from the front of it about 3½ inches. From my experience as a railroad man, that opening would serve the purpose of a hand-hold. There is no other reason for it being there. The company has had some correspondence with the Interstate Commerce Commission relative to the form of hand-holds or grab-irons that should be put on the cars, and has made an effort to put some different form of hand-hold on than these openings. It does not comply with the requirements of the Interstate Commerce Commission for they require the hand-hold to be turned down, which would be impossible on these cars because the radial coupler, in making the swing at the curves would break them off. What we have at-

tempted to put on is turned up instead of down. The cars referred to in the last three counts of the complaint, Inland Empire cars 4, 10 and 50, which are not equipped with an automatic coupler are a small interurban type of car used at the present time in the city limits. They are a large street-car. The trucks are low, the bodies are low, the draw bar being not over 18 inches from the rail, and it would not be possible to equip them with automatic couplers because the clearance would not be sufficient. These cars were used in interurban business on October 23d due to very heavy pressure of business caused by the race meeting at Allan, Idaho. They were made up in the shops at Spokane, and run solid from Spokane to Allan, Idaho, and from Allan back to Spokane. The trainmen were not required to and did not go between the cars to couple and uncouple them between the points mentioned. It would not be possible to couple these cars into a train with other cars. They must be left by themselves. It is a class of car to itself."

CROSS-EXAMINATION.

"The route over which these cars pass in coming into and out of the terminal station is the most direct route that could be taken. The same tracks that are used in the city streets are also used by our street cars. The track is a standard gauge 4 feet 8½ inch, and practically the standard weight of rail. It is substantially the same as the track on the interurban system except that we could not operate on any such curve on outside lines as there are in the city.

So far as the gauge is concerned, these trains are the same as the steam railroads. My superintendency is over the interurban lines. I do not control the street railway lines. On the interurban lines, tickets are sold for particular stations, the same as a railroad. We handle baggage for our passengers. Our trains are made up according to standard railroad rules with markers to designate the trains, and are run on schedules and by train orders. The employes who are engaged in the street car service do not have anything to do with the operation of the interurban service. They use the same tracks, however, that come from the freight depot to the passenger terminal in the heart of the city. We do not take passengers on the interurban trains within the city limits exclusively. We receive passengers at points within the city limits for transportation outside, and drop passengers on the interurban trains at various points within the city. But within the city limits we do no strictly street car business. I am familiar with the Master Car Builders' Book of Rules. It did not contemplate electric railways. According to that book of rules, the end sill has no connection with a hand-hold. I never saw an end sill like those on these cars before. I never saw on a steam railroad an end sill similar to what we have on the electric railroad. I never heard anyone describe them as a hand-hold. The openings in the end sills provide an absolute grab of the fingers, the hand. In addition to that you have got the full weight of the hand resting on the top in case you should lose your foot-

ing and be dropped. The man who is employed in coupling an air hose on such a train, and the train starts, could get something more than the ends of his fingers into that opening. I have tried it standing up, but never when I was stooping down in the position a man would be in who was coupling the hose. I have had no actual experience using it in actual coupling or uncoupling, but I have seen the process done many times. The purpose of a handhold is to afford security to a man who is between the cars if for any reason they should start. It is necessary for men to go between the cars and stoop down to connect the air hose and the electric light and heating wires. The man who is down between the cars is within four or five inches of the ground with his hands. If the car starts, he has to reach up 37 or 38 inches from the ground to get to the top of the end sill, and has to place his hand 3½ inches over the top of the sill if he reaches the opening, and then turn it an inch or three-quarters before he can get enough to grab on. I would not say that he could get nothing but the ends of his fingers in if he is stooping down and suddenly has to grab to save his life, but I don't believe I could get much more than the ends of my fingers up there myself."

RE-DIRECT.

"The Spokane & Inland Empire Railroad Company owns both the street railway lines and the interurban lines, but has two superintendents, one for its street railway lines and another for its interurban lines. The stops on our interurban lines are from

three to a mile to one for every mile, being nearer together as the city is approached. We do a local business, picking up people at cross-roads, bring them in and taking them back. In going out of and coming into town on the street railway lines on the city streets, we stop at all intersecting lines to take on and discharge passengers. The street railway lines are used for about a mile and a quarter."

RE-CROSS.

"The cars in street railway service are generally operated singly, but not always so. Generally, two or more cars are used in the interurban service, though at the present time we are running some single cars."

B. S. ROBERTSON, being first duly sworn, testified as follows:

"I am a railroad conductor, and have been in the employ of the Great Northern Railway for 23 years as brakeman, switchman, yardmaster, and conductor. I have had a great deal of experience in coupling and uncoupling cars, and in going between them, and am familiar with the types of hand-holds provided ordinarily on steam railroads for the security of men going between the cars. In a general way, there is uniformity in such appliances and the place of their location. The Great Northern coaches have hand-holds on the ends of the cars, and no strips. The baggage cars have strips and no hand-holds on one side of the draw bar. Where there is a hand-hold on passenger coaches on steam roads, it is about midway from the bottom of the wooden sill to the bottom of the car above the track. The hand-

holds that are used on steam railroads are about the height of my shoulder above the track. I am 5 feet 10 or 11 inches, and the hand-hold would strike me just about the shoulder. I have examined the passenger coaches on the Spokane & Inland Empire Railroad Company with reference to the openings which it claims is a hand-hold in the buffer or sill of their cars."

Thereupon, counsel for defendant asked the witness then on the stand this question.

"What would you say of them as a safe and proper appliance; one that would tend to preserve men from injury who might have to go between the cars for any purpose,"

Plaintiff's counsel thereupon objected to the question, stating that "the question is, is it a hand-hold," The Court sustained the objection "on the ground that it invades the province of the jury;" that defendant was seeking to prove by the witness the very question that the jury were to decide. Counsel for defendant thereupon made the following offer of proof:

"Now, if your honor pleases, I offer to prove by the witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve and does subserve the same purpose as the round iron appliance that is prescribed by the rules of the Inter-

state Commerce Commission at the present time and is in use on steam railroads, that it is a better appliance than these are for the purpose of protecting men from injury who have to go between the cars. I offer to prove that and to ask questions of this witness to that effect."

Thereupon counsel for plaintiff objected to the offer, and the Court sustained the objection upon the ground that it was not a question for expert testimony, but was a matter of common knowledge. Whereupon defendant asked and was allowed an exception and the witness was excused.

ARLINGTON MAHAN, being duly sworn, testified as follows:

"I am general foreman in the shops of the Spokane & Inland Empire Railroad Company. I am familiar with the passenger coaches of that company that have a buffer at the end and an opening in it. I was in the employ of the company at the time these cars or some of them were purchased. The openings were in the beam or sill when the cars were received. There were hand-holds up and down on the sides of the cars when they were received. There were none on the ends of the cars in the place they are put on steam cars. I know of no reason for the openings on top of the angle iron on that beam. The men use them for grab-irons whenever they have occasion to couple or uncouple cars, or go between them. I have had occasion to couple and uncouple cars in that yard and other yards."

Thereupon counsel for defendant asked the following question:

"Does that opening in the top of the sill serve the same purpose and is it as well fitted for the purpose of protecting the lives and limbs of men who have occasion to go between the cars in the exercise of their duties as the form of grab-irons that is used on steam cars, that is brought below the end of the car."

Counsel for plaintiff objected to the question, and the Court sustained the objection on the following grounds:

"I am of the opinion that this is one of the cases where witnesses must state facts and not conclusions, whether that is a reasonably safe appliance is within the knowledge of the ordinary man and no special experience is required."

Thereupon defendant asked and was allowed an exception to the ruling. The witness further testified:

"I am familiar with the form of grab-iron or hand-hold that is used on the passenger cars of steam railroads. It is attached to the end of the car, one on each corner, and projects downward. The Interstate Commerce Commission requires that they shall have a clearance of at least two inches, preferably two and a half, below the car sill. The handle runs different lengths. The Interstate Commerce Commission requires that it shall be not less than 16 inches inside clearance. There is one of these on each side of the draw bar. The opening

in the angle iron in that buffer on the Spokane & Inland Empire cars runs in length from 16 to 24 inches. It is from 2½ to 2¾ inches wide, and there is one of such openings on each side of the draw bar on both ends of the car, making four in all. It would be impossible to put on the passenger cars of the defendant such grab-irons as are in use on the cars of steam railroads because in going around the curves on the city streets the coupler would strike a brake."

And thereupon the following question was asked, and the following matters occurred:

"In your opinion, Mr. Mahan, and observation of these cars, is the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those that are used upon steam railroads?"

MR. DOHERTY: The question is objected to.

THE COURT: I will sustain the objection.

MR. GRAVES: To which we take an exception.

MR. GRAVES: I now offer to prove by this witness and also by other witnesses called, with your Honor's permission, that the opening in this angle iron or sill or buffer is a better and safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grab-iron or hand-hold that is known in railroad circles.

MR. DOHERTY: I object to that.

THE COURT: Objection sustained on the ground that it is a question for the jury.

MR. GRAVES: To which the defendant excepts.

CROSS-EXAMINATION.

"The grab-iron or hand-hold used on steam railroads is a long piece of metal affixed to the end of the sill projecting downwards so it can be easily grasped by the hands. There is nothing like that on these cars. I have had steam railroad experience. I have had occasion in my railroad experience to use a grab-iron as a life saving device when I was between the cars coupling an air hose when they started. I was stooping down at the time. It was one of the Inland cars and was in the yards at the time. It did not start so very slowly."

Thereupon the defendant rested and the plaintiff rested also.

The foregoing setting forth and containing all the evidence introduced and offered by the parties to the cause, at its conclusion, both having rested, the defendant challenged the sufficiency of the evidence, moved the Court for a non-suit, and that the cause be taken from the jury and the action dismissed upon all of the counts. Defendant further moved the Court that in the event and only in the event that the Court denied the motion to dismiss as to all the counts, to dismiss as to the last three counts of the complaint, those that charged a failure to equip cars with automatic couplers. The Court overruled both motions, and thereupon the defendant asked and was allowed an exception to such ruling. Before

the jury were charged, the defendant in writing requested the following instructions:

I.

"The plaintiff herein has not made out a case against defendant on any of the causes of action stated in its complaint, and you will therefore return a verdict in defendant's favor."

"In the event that the Court should refuse to give the above requested instruction No. 1, then the defendant requests the Court to give the following instruction:

I.

You are instructed that the plaintiff has made out no case against defendant as to the first twelve causes of action pleaded in its complaint, and as to those causes of action your verdict must be for defendant."

"In the event that the Court shall refuse to give instruction No. 1 hereinabove requested, instructing the jury to return a verdict in defendant's favor, and not otherwise, the defendant requests the Court to instruct the jury as follows:

I.

An act of Congress requires cars which are used in interstate business to be equipped with couplings which will couple automatically by impact, and to be provided with secure grab-irons or hand-holds in the ends and sides of the cars. The act provides, however, that it shall not apply to cars used in interstate commerce which are used upon street railways. I charge you that under this provision there

can be no recovery against defendant for a failure to equip any of its cars which are run over its street railway lines, whether engaged exclusively in handling purely street railway business or not, with the safety appliances enumerated by the act. If you find from the evidence, therefore, that in the operation of its electric railway lines the defendant habitually runs the cars referred to in the several causes of action set up in plaintiff's complaint, or any one of them, over its street railway lines, in order to reach its passenger station, any car so used is exempt from the operation of the act, and you cannot award any recovery against defendant for the failure to equip any car so used with the appliances prescribed by the act."

Counsel for plaintiff and defendant having addressed the jury, the Court instructed the jury as follows:

"Gentlemen of the Jury, section 4 of the safety appliance Act of 1903 provides that "From and after the first day of July, 1905, and until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railway company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of any car, for greater security to men in coupling and uncoupling the cars.'

"Section one of the act amended March 2nd, 1903, provides: 'That the Act shall not apply to cars which are used upon street railways.'

"The first question as to whether or not these hand-holds or grab-irons were sufficient presents a question of fact for your consideration.

"The second question, that is, whether the cars were run on a street railway, presents a question of law for the consideration of the Court, which I will determine hereafter.

"As to the requirements of this Act I charge you as follows: The Act of Congress relative to safety appliances provides that railroad cars 'used in interstate commerce shall be provided with secure grab-irons or hand-holds on the ends and sides of each car for greater safety to men in coupling and uncoupling cars.' It is charged in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th causes of action herein that the cars described in and referred to in said causes of action were without grab-irons or hand-holds at the ends of such cars. The purpose of the act is to afford greater security to men coupling or uncoupling cars by reason of the presence of grab-irons or hand-holds, than would be possible if there were nothing of the sort on the ends of the cars. If you should find from the evidence in this case that although there might not have been on the ends of the cars referred to anything which would be known technically as grab-irons or hand-holds, yet if there were upon the ends of such cars an appliance which could be used as a grab-iron or hand-hold and which would afford as much security to men coupling or uncoupling the cars as would be afforded by having what would

be technically known as grab-irons or hand-holds on the ends of the cars, then your verdict should be for the defendant.

"The law does not require any particular kind of grab-iron or hand-hold to be placed upon the end of the car, but only requires that some such appliance shall be placed there which will afford the person coupling or uncoupling cars equal security with that which would be obtained by the method I have given.

"Gentlemen, you have heard the testimony in this case and you have examined the hand-holds in question, and it is for you to say from that testimony and from your personal examination of the cars whether the appliance provided by this company complies with the Act of Congress; in other words, whether it affords that safety and protection to employes which the law contemplates and requires.

"The burden is upon the Government to establish its case by a preponderance of the testimony. If, from a preponderance of the testimony offered herein you are satisfied that the defendant has not furnished grab-irons or hand-holds as I have defined these terms to you within the meaning of the law, you will find the defendant guilty on the first twelve counts.

"As to the last three counts, you will find the defendant guilty on each count and this Court will determine what effect shall be given to your conclusion hereafter.

"I charge you as a matter of law that these trains were employed in interstate commerce, inasmuch as

they run between the city of Spokane in the state of Washington and Coeur d'Alene City in the state of Idaho."

At the conclusion of the instructions, the defendant excepted to the Court's refusal to instruct the jury to find for the defendant on all the counts, and excepted also to the Court's instructing the jury to find the defendant guilty upon the last three counts, 13, 14 and 15, and its exceptions were allowed. The jury thereupon retired to consider their verdict, and thereafter returned into Court a verdict for the plaintiff finding the defendant guilty upon each and every count of the complaint, and awarding against it a verdict of $1500 on account thereof.

Thereafter, defendant moved the Court to enter judgment in its favor herein dismissing the action and for costs, notwithstanding the verdict returned herein by the jury, for the reason that the verdict is contrary to law and to the undisputed evidence in the case, and that under the law and the facts defendant was entitled to judgment.

Such motion was overruled, and the defendant asked and was allowed an exception thereto.

Thereafter also the defendant duly served and filed its petition for a new trial, which was as follows:

"Defendant prays the Court to grant it a new trial in this action for the following causes:

"First: Insufficiency of the evidence to justify the verdict herein.

"The evidence was insufficient to justify the verdict for the reason:

"(a) That it appears that the cars referred to in plaintiff's complaint were cars which are used upon a street railway line, and being so used do not come within the operation of the act; also

"(b) Because it appears that the hand-hold or grab-iron in the buffer or sill at the ends of such cars were sufficient within the meaning of the act of congress pleaded in the complaint.

"Second: Error in law occurring at the trial and excepted to at the time by defendant. The particular errors relied upon are:

"(a) The exclusion of the testimony of skilled and experienced railway men to the effect that the hand-holds or grab-irons in the buffers of the cars described in the complaint were sufficient to accomplish the purpose intended to be accomplished by the provisions of the act, and better than those commonly in use upon cars;

"(b) In rejecting its offer to prove the facts last above stated.

"(c) In denying defendant's motion for a nonsuit.

"(d) In denying defendant's motion to instruct the jury to return a verdict in its favor.

"(e) In instructing the jury to return a verdict of guilty against defendant on the last three counts in the complaint.

This petition is based and will be heard upon the pleadings herein, and the record made during

the progress of the trial, and upon all the minutes of the Court."

Which motion for a new trial was, after argument by counsel for and against the motion respectively and after due consideration by the Court, overruled.

And now in furtherance of justice and that right may be done, the defendant tenders and presents the foregoing as its bill of exceptions in this case to the action of the Court, and prays that the same be settled and allowed and signed and sealed by the Court, and made a part of the record in this case, and the same is accordingly done this 2nd day of November, 1912.

FRANK H. RUDKIN,
District Judge.

Endorsements: Bill of Exceptions. Filed November 2, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
Defendant.

STIPULATION.

IT IS STIPULATED that the bill of exceptions heretofore proposed by defendant and submitted to

plaintiff is correct and may be settled and signed by the trial judge without further delay, the plaintiff having no amendments to propose thereto, and being willing that said bill shall be settled forthwith.

Dated November 1st, 1912.

(Signed) OSCAR CAIN,

Attorney for Plaintiff.

(Signed) GRAVES, KIZER & GRAVES,

Attorneys for Defendant.

Endorsements: Stipulation. Filed November 2, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named plaintiff, Spokane & Inland Empire Railroad Company, and in connection with its petition for writ of error makes the following assignments of error which it avers were committed by the Court in the trial of this cause and upon which it will rely in its prosecution of the writ of error in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit.

First: The Court erred in excluding the testi-

mony of skilled and experienced railway men experienced in the switching and handling of cars, and who had examined the cars described in the complaint, relative to the sufficiency of the hand-holds on the buffers or sills of the cars as a means of protection to the men who might be required to go between the cars in the process of coupling or otherwise handling them.

Second: The Court erred in rejecting defendant's offer to prove by skilled and experienced railway men accustomed to the handling and coupling of cars, and who had examined the cars described in the complaint, that the hand-holds or grab-irons in the buffers or sills of such cars were sufficient to protect men who might be required to go between the cars in coupling or otherwise handling them, that they were sufficient to accomplish purposes intended to be accomplished by the provisions of the safety appliance act requiring hand-holds or grab-irons to be placed upon the end of cars used in interstate commerce, and that they were better than those commonly used upon cars engaged in interstate commerce.

Third: The Court erred in denying defendant's motion for a non-suit made at the conclusion of all the evidence and that the cause be taken from the jury and the action dismissed upon all the counts.

Fourth: The Court erred in denying defendant's motion to dismiss as to the last three counts of the complaint, those that charged a failure to equip cars with automatic couplers.

Fifth: The Court erred in refusing to give defendant's requested instruction numbered one, to the effect that the plaintiff had not made out a case against defendant on any of the causes of action stated in its complaint, and that the jury should therefore return a verdict in defendant's favor.

Sixth: The Court erred in instructing the jury to find the defendant guilty upon the last three counts of the complaint, thirteen, fourteen and fifteen, wherein the defendant was charged with a failure to equip cars used in interstate commerce with automatic couplers which would couple by impact.

Seventh: The Court erred in denying defendant's motion for judgment notwithstanding the verdict returned by the jury wherein it moved that the Court enter judgment in defendant's favor dismissing the action, and for costs.

Eighth: The Court erred in denying defendant's petition for a new trial.

Ninth: The Court erred in rendering judgment against defendant.

WHEREFORE, defendant prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that said Court be directed to set aside the judgment heretofore entered in plaintiff's favor and enter judgment in defendant's favor, dismissing the action, or if it be deemed that such relief is not grantable, that the cause be remanded for a new trial.

(Signed) GRAZES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of the within Assignment of Error is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,
U. S. Attorney.

Assignment of Errors. Filed February 18, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
Defendant.

PETITION FOR WRIT OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above named defendant Spokane & Inland Empire Railroad Company, by its attorneys, and complains that in the record and proceedings had in this cause and in the order of the Court denying defendant's motion for judgment in its favor and in entering judgment in plaintiff's favor, and in all the matters and things complained of in the assignments of error filed herein in aid of this petition for a writ of error, manifest error appears to the wrong and injury of this defendant. Your petitioner presents herewith assignments of error wherein are set forth the errors alleged to have been committed by the

District Court in the trial of this cause, and of which it will complain in the prosecution of a writ of error.

WHEREFORE, defendant prays for the allowance of a writ of error to the said District Court and for an order fixing the amount of the bond to be given thereon, and for such other orders and processes as may cause the same to be corrected by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 18th day of February, 1913.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of the within Petition for Writ of Error is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,
U. S. Attorney.

Petition for Writ of Error. Filed February 18, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
Defendant.

ORDER ALLOWING WRIT OF ERROR.

The defendant Spokane & Inland Empire Railroad Company having this day filed its petition for

a writ of error from the judgment heretofore entered herein against it to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an assignment of errors specifying the matters of which complaint is made and of which it will complain, all within due time, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error.

NOW, THEREFORE, it is ordered that a writ of error be and hereby is allowed for the purpose of review in the United States Circuit Court of Appeals from the Ninth Judicial Circuit of the judgment heretofore entered herein, and of all proceedings in said cause, and that the amount of bond on said writ of error be and hereby is fixed at five hundred ($500) dollars.

Dated this 18th day of February, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Service of the within Order Allowing Writ of Error is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,
U. S. Attorney.

Order Allowing Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, February 18th, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,

Defendant.

WRIT OF ERROR.

(Lodged Copy.)

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable, the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the Spokane & Inland Empire Railroad Company, plaintiff in error, and the United States of America, defendant in error, manifest errors have happened to the great wrong and injury of the Spokane & Inland Empire Railroad Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and complete justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal and distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit,

together with this writ so that you have the same at the city of San Francisco in the State of California, on the 18th day of March next in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the HONORABLE EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 18th day of February, in the year of our Lord one thousand nine hundred and thirteen.

W. H. HARE,
Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division.

(Seal.) By Frank C. Nash, Deputy.

Endorsements: Service of the within Writ of Error is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,
U. S. Attorney.

Writ of Error (Lodged Copy.). Filed February 18, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD, COMPANY,

Defendant.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That we, Spokane & Inland Empire Railroad Company, as principal, and American Surety Company of New York, a corporation duly authorized under the laws of the State of Washington and of the United States to become surety on bonds in such cases, as surety, are held and firmly bound unto the United States of America in the sum of Five Hundred ($500) Dollars to be paid to it, and for the payment of which sum well and truly to be made we bind ourselves, and each of us, and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our hands and dated this 18th day of February, 1913.

The condition of the foregoing bond is such that WHEREAS, in the District Court of the United States in and for the Eastern District of Washington, Northern Division, in an action pending in said Court between the United States of America, as plaintiff, and the Spokane & Inland Empire Railroad Company, as defendant, a judgment was entered

in favor of plaintiff and against said defendant awarding plaintiff a recovery of fifteen hundred ($1500) dollars and its costs; and

WHEREAS, the above named defendant has obtained from said Court a writ of error to reverse said judgment and a citation directed to the above named plaintiff citing and admonishing it to appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco in the State of California, for the purpose of having said judgment reviewed and error alleged to have occurred therein to be corrected.

NOW, THEREFORE, the condition of this obligation is such that if the said Spokane & Inland Empire Railroad Company shall prosecute its said writ to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

Dated this 18th day of February, 1913.

(Signed) SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
By GRAVES, KIZER & GRAVES,
Its Attorneys.

(Signed) AMERICAN SURETY COMPANY OF NEW YORK,
By FRANK C. PAINE,
Resident Vice-President.

Attest:
(Signed) B. H. KIZER,
Resident Secretary.

(Seal of Corporation Surety Company.)

The foregoing bond approved this 18th day of February, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Service of the within Bond on Writ of Error is hereby acknowledged this 18th day of Feb., 1913.

(Signed) OSCAR CAIN,
U. S. Attorney.

Bond on Writ of Error. Filed February 18th, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
Defendant.

CITATION.

(Lodged Copy.)

UNITED STATES OF AMERICA: ss.

The President of the United States of America, to the United States of America, plaintiff, and to Oscar Cain, your attorney, greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty

days from the date of this writ pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein Spokane & Inland Empire Railroad Company is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment and other proceedings had in said cause in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the HONORABLE EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of February, 1913, and of the independence of the United States, the 137th.

(Signed) FRANK H. RUDKIN,
United States District Judge.

(Seal.)

Attest:

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

Endorsements: Service of the within Citation is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,
U. S. Attorney.

Citation (Lodged Copy.). Filed in the U. S. District Court for the Eastern District of Washington, February 18th, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD, COMPANY,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court of the United States, for the Eastern District of Washington, Northern Division:

You will please prepare transcript of the complete record in the above entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under a writ of error to be perfected to said Court, and include in said transcript the full proceedings, pleadings, papers, records, and files, to-wit:

Complaint.

Answer.

Reply.

Verdict.

Defendant's motion for judgment notwithstanding the verdict.

Opinion of the Court denying defendant's motion for judgment notwithstanding the verdict.

Defendant's petition for a new trial.

Opinion denying defendant's petition for a new trial.

Judgment.

All stipulations and orders extending the time to file a bill of exceptions.

Bill of exceptions.

Assignment of errors.

Petition for writ of error.

Order allowing writ of error.

Writ of error.

Citation.

Also any and all other record entries, pleadings, proceedings, papers and files necessary or proper to make a complete record upon said writ of error in said cause, transcript to be prepared by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) GRAVES, KIZER & GRAVES,
Attorneys for Defendant.

Endorsements: Service of the within praecipe for transcript of record is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,
U. S. Atorney.

Praecipe for Transcript of Record. Filed February 18, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOPANE & INLAND EMPIRE RAILROAD COMPANY, a Corporation,

Defendant.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Eastern District of Washington,—ss.

I, W. H. HARE, Clerk, of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing printed pages, numbered from one to 82 inclusive, to be a full, true, correct and complete copy of so much of the record, papers, bill of exceptions and other proceedings as called for by the defendant and plaintiff in error in its praecipe therefor as the same appears on page 82 of this printed record, and as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on writ of error from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of $139.25, and that the same has been paid to me by Graves, Kizer & Graves, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said district, this 8th day of March, 1913.

(Signed) W. H. HARE,
Clerk.

(Seal.)

IN THE

United States Circuit Court

of Appeals for the Ninth Circuit

SPOKANE & INLAND EMPIRE RAILROAD COMPANY,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Error to the District Court of the United States for the Eastern District of Washington

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BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

(NOTE.—For convenience in referring to the parties in the statement of the case and its discussion, the parties will be designated as in the trial court;

the plaintiff in error as defendant, and the defendant in error as plaintiff.)

This is an action to recover penalties under the Safety Appliance Act, the plaintiff alleging in its complaint fifteen violations of the act in as many separate counts. Judgment was rendered against the defendant for $1500, the full amount demanded, and it has sued out a writ of error to reverse such judgment.

Each count of the complaint charges that defendant is a common carrier engaged in interstate commerce by railroad. The first twelve counts charge that defendant on certain specified dates hauled cars over its railroad from which the grab irons or hand holds at the ends were missing. The last three counts charged that on specified dates it hauled cars over its railroad which were not equipped with couplers coupling automatically by impact, but with link and pin couplers. The de-

fendant, answering the first twelve counts of the complaint, admitted that it was a common carrier engaged in interstate commerce, and that it hauled the cars described on the dates specified. It denied, however, that the grab irons or hand holds were missing from the ends of such cars. Answering the last three counts, it admitted as above, and admitted also that the cars referred to were equipped with link and pin couplers, and not with couplers coupling automatically by impact. It pleaded affirmatively in defense to all the counts that all the cars described therein were, on the dates referred to, and at all other times, used by it upon its lines of street railway. Plaintiff joined issue upon the affirmative defense by reply.

The cause was tried to a jury. The record shows that defendant owns and operates a street railway system in Spokane, Washington, and several suburban and interurban lines extending therefrom, including one which extends to Coeur d'Alene,

Idaho. All these lines are operated by electricity. Its passenger station in Spokane is situated in the heart of the business district, and its suburban and interurban trains reach it by passing over its street railway tracks, laid in the city streets, for a distance of about a mile and a quarter. Those tracks are used only by street cars and suburban and interurban trains carrying passengers. The suburban and interurban trains sometimes consist of one car, and sometimes of two or three cars coupled together. Outside of the city, they are run on the defendant's private right of way, are operated by regular train rules, make stops at distances varying from one to the mile to three to the mile, and tickets are sold for them and baggage checked over them as on regular trains. Inside the city, they make stops to take on passengers going out of the city, and to discharge those coming into the city, at intersecting streets, but do not carry passengers from point to point within the city. The

lines are, in short, the usual electrically operated suburban type so common at the present day, the Coeur d'Alene line departing from the usual only in that it extends across a state boundary line.

With respect to the cars described in the first twelve counts of the complaint, it appears that these were used regularly on the run between Spokane, Washington, and Coeur d'Alene, Idaho, two or three cars coupled together usually comprising a train. On each trip these trains ran for a distance of about a mile and a quarter over defendant's street railway lines in going out of and coming into Spokane, there being no other way to enter the city. Several short turns have to be made in this distance in passing from one street to another, the curves necessary to make the turns running from 36° to almost 100°. The curves on steam railroads run from 4° to 10°. To make these short curves, defendant's cars are made with a buffer or sill at the end, which is rounded at the

corners. Underneath the sill the coupler is swung, so arranged that it will swing freely from one side of the car to the other. But for this arrangement the cars could not be run over the street railway lines, as it could not make the abrupt turns but for the rounded corners and the couplers swinging freely from one side entirely over to the other. On steam railroads, where no such conditions are presented, the ends of the cars are square, and the grab irons or handholds at the ends of the cars consist of an iron rod fastened to and projecting below the end sill, and that is the construction required by the rules adopted by the Interstate Commerce Commission about a year ago. It would be impossible to equip defendant's cars with such a handhold at the ends and continue to enter Spokane on its street railway tracks, for in making the sharp turns on the streets the couplers, in swinging from one side of the car to the other, would strike the projecting handholds,

either breaking them off every time the train turned a corner, or derailing the cars. When the cars were built, therefore, an angle iron was placed on top of the end sills extending across the end of the car, made of half inch material, and on either side of the coupler, on both ends of the car, openings were left in the iron twenty-two and a half inches long, two and one half inches wide, and about three and one half inches back from the edge of the sill. These, defendant contended, were grab irons or handholds within the meaning of the Safety Appliance Act, and afforded all the protection to men who might be required to go between the cars that would be afforded by any type of handhold.

As to the cars referred to in the last three counts of the complaint, which were charged not to have been equipped with automatic couplers, it appears that they were customarily used on the street railway lines in purely street railway traffic. The

government inspector testified that "They were ordinary traction cars, small in construction. I would consider it a street car. It would be impossible to equip such a car with automatic couplers." Defendant's superintendent testified that the cars "are a small interurban type of car used at the present time in the city limits. They are a large street car. The trucks are low, the bodies are low, the draw bar being not over 18 inches from the rail, and it would not be possible to equip them with automatic couplers, because the clearance would not be sufficient." On the day counted on in the complaint, there was a race meeting at Allan, Idaho, and an unusual press of business. The cars in question were temporarily taken out of street railway service, coupled together with their link and pin couplers in the shops at Spokane, and run as a solid train, without uncoupling, from Spokane to Allan, and then back to Spokane. This, defendant contended, was not a violation of

the Safety Appliance Act.

During the progress of the trial, defendant offered expert evidence to prove that the openings in the tops of the end sills of the cars referred to in the first twelve cars of the complaint served all the purposes of handholds, and were better for that purpose than those generally in use. This evidence was rejected. Error assigned thereon will be discussed in detail under the second head of our argument. At the close of all the evidence, defendant moved for a non-suit and the dismissal of the action on the ground that no violation of the Safety Appliance Act had been proven. The motion was denied and exception taken. Defendant then requested the court to instruct the jury that the plaintiff had not made out a case on any of its counts, and that they must return a verdict in defendant's favor. The court refused to so instruct, and instead instructed the jury to find defendant guilty on the last three

counts of the complaint (those referring to automatic couplers), and left to them as a question of fact whether the openings in the end sills of the cars referred to in the first twelve counts served the purpose of handholds. The jury returned a verdict against defendant on the entire fifteen counts, and defendant moved the court for judgment in its favor notwithstanding the verdict. Its motion being denied, it petitioned for a new trial. This was likewise denied, and from the judgment entered upon the verdict defendant has sued out this writ of error.

SPECIFICATIONS OF ERROR.

Defendant relies upon the following errors as cause for reversal herein:

First: The action of the court in sustaining plaintiff's objection to the question asked the witness Robertson with respect to the openings in the buffers or sills of the cars referred to in the

first twelve counts of the complaint, which are claimed by defendant to be handholds, *viz.*:

> "What would you say of them as a safe and proper appliance, one that would tend to preserve men from injury who might have to go between the cars for any purpose?" (Record, page 57.)

Second: The action of the court during the examination of the witness Robertson, in rejecting the following offer of proof:

> "Now, if your honor pleases, I offer to prove by the witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve the same purpose, and does subserve the same purpose, as the round iron appliance that is prescribed by the rules of the Interstate Commerce Commission at the present time and is in use on steam railroads, that it is a better appliance than these are for the purpose of protecting men from injury who have to go between the cars. I offer to

prove that and to ask questions of this witness to that effect.'' (Record, pages 57-58.)

Third: The action of the court in sustaining plaintiff's objection to the question asked the witness Mahan with respect to the openings in the sills of the cars, to-wit:

> ''Does that opening in the top of the sill serve the same purpose and is it as well fitted for the purpose of protecting the lives and limbs of men who have occasion to go between the cars in the exercise of their duties as the form of grab-iron that is used on steam cars, that is brought below the end of the car?'' (Record, page 59.)

Fourth: The action of the court in sustaining plaintiff's objection to the question asked the witness Mahan with respect to the openings in the sills of the cars:

> ''In your opinion, Mr. Mahan, and observation of these cars, is the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those

that are used upon steam railroads''? (Record, page 60.)

Fifth: The action of the court in rejecting defendant's offer to prove, during the examination of the witness Mahan, as follows:

> ''I now offer to prove by this witness, and also by other witnesses called, with your Honor's permission, that the opening in this angle iron or sill or buffer is a better and safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grab iron or handhold that is known in railroad circles.'' (Record, page 60.|)

6. The action of the court in denying defendant's challenge to the sufficiency of the evidence at the close of all the evidence, and in denying defendant's motion for a non-suit, and that the cause be taken from the jury and the action dismissed upon all of the counts. (Record, page 61.)

Seventh: The court's action in denying defendant's motion that in the event, and only in the event,

that the court denied the motion to dismiss as to all the counts, that it dismiss as to the last three counts of the complaint, those that charged a failure to equip cars with automatic couplers. (Record, page 61.)

Eighth: The court's action in refusing defendant's request to instruct the jury as follows:

> "The plaintiff herein has not made out a case against defendant on any of the causes of action stated in its complaint, and you will therefore return a verdict in defendant's favor." (Record, page 62.)

Ninth: The action of the court in denying defendant's motion to enter judgment in its favor dismissing the action and for costs notwithstanding the verdict returned by the jury, for the reason that the verdict is contrary to law and to the undisputed evidence in the case, and that under the law and the facts defendant was entitled to judgment. (Record, pages 27-33.)

Tenth: The action of the court in denying defendant's petition for a new trial for the reasons and on account of the matters set forth in such petition. (Record, pages 34-38.)

Eleventh: The action of the court in entering judgment upon the verdict against defendant. (Record, pages 39-40.)

The foregoing assignments, while on their surface too numerous for respectful consideration, in fact go to but two questions, the first five presenting defendant's claim that the trial court erred in refusing to receive expert evidence relating to the sufficiency of the openings in the end sills of the cars as handholds within the meaning of the Safety Appliance Act, and the remaining assignments presenting the defendant's claim that it is not amenable to the provisions of the Safety Appliance Act, and that judgment should have been entered in its favor as a matter of law. The speci-

fications of error will be discussed in inverse order to that in which they are stated, since the last assignments, if decided in defendant's favor, will obviate the necessity of a consideration of the first assignments, which merely go to the question of its right to a new trial should it be held that it is subject to the provisions of the Safety Appliance Act.

ARGUMENT.

I.

The Provisions of the Safety Appliance Act Are Not Applicable to Cars Used As Are Defendants.

The claim that the court should have ruled as a matter of law upon all the evidence that defendant was not guilty of any violation of the Safety Appliance Act is based upon the exception to the act found in the amendment of 1903, which excepts from the operation of the act trains and cars "which are used upon street railways." The evi-

dence discloses, without dispute, that the defendant's cars referred to in the complaint are used upon street railways, and are therefore, as we claim, exempt from the operation of the act.

To appreciate the full effect of the exception, it is desirable to consider the act and its amendments historically.

When Congress enacted the original Safety Appliance Act in 1893, it undoubtedly had in mind only steam railroads and the locomotives and cars used in their operation. Such railroads were then the only sort engaged in interstate commerce, and indeed, were practically the only type. Electricity as a propulsive power was in its infancy. Suburban or interurban railway lines, which the development of electric power have made so common, were then unheard of. If any dreamer in Congress then conceived it possible that at some time the use of electricity might render feasible the exten-

sion of local railway lines beyond the boundaries of cities, his dreams never compassed the notion that such lines would become so numerous and do so large a business that it would be necessary for Congress to legislate concerning them as highways of interstate commerce. By 1903, however, conditions had greatly changed. Electricity had substantially supplanted all other forms of propulsive power in the operation of urban railways, and had called into being many suburban lines, a number of which, generally through the situation of cities on the opposite banks of a stream dividing two states, were highways of interstate commerce. The original act excepted from its penalties "trains composed of four wheeled cars" and "locomotives used in hauling such trains." 27 Statutes at Large, 532. The amendment of 1896 amended this exception so that it read as follows:

> "Provided that nothing in this act contained shall apply to trains composed of four wheeled cars or to trains composed of eight wheeled

> standard logging cars where the height of such car from top of rear to center of coupling does not exceed 25 inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."
>
> 29 Statutes at Large, 85.

The amendment of 1903 extended the operation of the act in many respects; among others, so that its provisions should "apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith." 32 Statutes at Large, 943. With such enlargement of the operation of the act went an enlargement of the exceptions to its operation, the amendment excepting therefrom "those trains, cars, and locomotives exempted by the provisions of section 6 of said act of March 2, 1893, as amended by the act of

April 1, 1896, or which are used upon street railways.''

Giving to the language of the last exception the meaning which, with respect to any other matter, would be given to its plain, simple words, it is patent that defendant's cars which are described in the complaint are not affected by the act. Those cars are used for the carriage of passengers between Spokane, Washington, and Coeur d'Alene, Idaho. Spokane is a city of considerable size. In order to operate defendant's line it is essential that its suburban trains have access to its passenger station in the heart of the city. It owns street railway lines laid upon the city streets which reach that passenger station, and it has no other means of gaining access to that station than over those street railway lines. The cars in question, on every run they make, are run over those street railway lines for a distance of a mile and a quarter in entering and in going out of the city. Their

use upon those lines is an essential, integral part of their use upon a highway of interstate commerce for the carriage of interstate business. But for the fact that they were used upon the street railway lines, they would not be used upon the interstate highway. The fact that they are used over a longer distance, and for a greater length of time, upon a private right of way outside the limits of the city, does not alter the fact that they are used upon street railways in every run they make, and that their use upon street railways is as integral a part of their operation as is their use upon an interstate highway. Unless the plain language of the statute is nullified, then it must be held that they are excepted from the operation of the Safety Appliance Act.

It was urged below, and the trial judge held, that the exception applied only to cars which were exclusively used upon street railways, and did not apply to cars which were used for a part of the

time, or for a part of their run, upon street railways.

If it is permissible for the courts to supplement and amend legislation whenever it seems to them desirable to do so, that construction may be upheld; otherwise not. Had Congress desired to except from the operation of the act street railway lines, or street cars, or cars which are used exclusively upon street railway lines, it may be presumed that in one or the other house some member would have been found with sufficient command of the English language to express the idea. Congress was adopting an amendment to a remedial statute which had been in existence for ten years. By broadest expressions and most sweeping language it had extended the act to embrace every sort of road over which Congress had jurisdiction, and to include every vehicle of whatsoever character used thereon. The Congress of 1893 had thought proper to make an exception to

the operation of this remedial statute. The Congress of 1896 had seen fit to further extend the exception to its operation. The Congress of 1903, while greatly enlarging the general scope of the act, preserved the exceptions introduced by the previous Congresses and added yet another exception thereto. Now the Congress of 1903 was more impressed than the Congresses of 1893 and 1896, even, with the necessity for the regulation of railway companies within the jurisdiction of Congress, and particularly with respect to the provisions for the safety of the employees of such railways. The spirit of the time was trending that way, an historical fact which all men know. It was in sympathy with that spirit that Congress by its amendment made the act applicable to every railway over which it had jurisdiction. For reasons satisfactory to it, however, Congress, while so much extending the operation of the act, deemed it proper to extend still further the excepton. But it is plain

that the spirit of the times is reflected in the amendment, and that it would have prevented Congress from making any broader exception than sufficient reasons seemed to require. The exception must have received careful consideration from Congress, for it would not with pains and care have so extended the operation of the act and then unthoughtedly introduced an exception which would nullify much of that which it had accomplished by the extension just provided for. It seems, then, too plain for argument that if Congress had desired to except from the operation of the act only such cars as were exclusively used for street railway purposes upon street railway lines, it would have so expressed itself in language concerning which there could be no misunderstanding.

That Congress did not intend to restrict the exception to cars exclusively used upon street railway lines is made clear by the context. The amendment of 1896 excepted certain types of cars and

locomotives used in hauling them, but only upon the condition that "such cars or locomotives are exclusively used for the transportation of logs." The amendment of 1903 referred to this exception and adopted and preserved it and added thereto the additional exception of cars "which are used upon street railways." Common sense forbids, in the light of these two sections, that the omission to use the word "exclusively" in the last exception should be said to be of ignorance rather than of intention. Mere ignorance has a fashion of borrowing from the wisdom of others, and if the Congress of 1903 was ignorant of the necessity, or at least propriety, of using the word "exclusive" when it meant that an excepted use should be exclusive, it seems somewhat more than probable that it would have borrowed the word from the exception of the amendment of 1896, wherein it was provided that in order that the described trains and locomotives should be exempted, they must be "ex-

clusively used'' for a certain purpose.

The reason upon which the trial judge based his decision on this branch of the case is found in one sentence in his opinion denyng the motion for judgment notwithstanding the verdict:

> ''The object of the safety appliance act is to protect those engaged in hazardous occupations in which thousands of men are annually maimed and killed, and there is nothing in the record to indicate that there is less hazard in the operation of an interurban train than any other.''

The object of the Safety Appliance Act is stated in the above sentence with undeniable accuracy. We think it quite probable, also, that there is nothing in the record relating to the comparative hazards of the operation of an interurban train and of any other train. That, we conceived at the time of the trial, and conceive now, is not a matter with which the courts have to deal. Their province is to ascertain what Congress has declared and to enforce

its declaration. To base a decision denying exemption from the operation of the act to trains which are used in interurban service merely because the evidence does not indicate that they are less hazardous in operation than other trains which come within the operation of the act, is to overlook the context, and, at the least, is extremely illogical. Congress, from the first, made exceptions to the operation of the act. The act of 1893 excepted trains of four-wheeled cars and the locomotives used in drawing them. In 1896 it added to the former exception trains composed of eight-wheeled standard logging cars and locomotives used for drawing them when the same were used exclusively for the transportation of logs. We fancy that no court would undertake to read into the act trains composed of four-wheeled cars with their locomotives and trains composed of eight-wheeled standard logging cars with their locomotives used exclusively for the transportation of logs, merely because the

record did not suggest that their operation was less hazardous than the operation of trains made up of other sorts of cars, or used for other purposes than the transportation of logs. When the amendment of 1903 was adopted, which undoubtedly extended the operation of the act over many railroads not theretofore embraced within its provisions, Congress saw fit to preserve the former exceptions and to add thereto an exception of trains and cars "which are used upon street railways." We do not believe that the courts have any right to disregard the exception of trains and cars which are used upon street railways merely because in a given case they conceive the operation of those trains and cars to be as dangerous as the operation of any other type of trains and cars.

There is a reason, and a very palpable reason, for the exception, and it becomes apparent upon considering the original act and its several amendments. That the act was intended to remedy the

evils existing in the operation of great railroad systems with thousands of miles of track and employing thousands of men is obvious. It is so declared in the historical treatment of the act in *Johnson vs. Southern Pacific Co.*, 196 U. S. 1. Yet the original act, adopted after all the careful consideration, the discussion, and the amendment which the opinion just referred to shows it to have received in Congress, contained an exception that "nothing in this act shall apply to trains composed of four-wheeled cars or to locomotives used in hauling such trains." Manifestly there is as much danger in coupling four-wheeled cars as in coupling eight-wheeled cars, and a man who is obliged to go between four-wheeled cars is as much exposed to danger from their sudden movement as though he were between eight-wheeled cars. It is clear, therefore, that the exception was made not because the handling of the cars of the excepted type was deemed less hazardous than the handling

of other types of cars, but because Congress thought it unnecessary or unwise to place upon small roads, such as would use cars of the excepted type, the burden it was considered necessary to impose upon the larger railroads of the country.

Came the amendment of 1896, and added to the former exception that of "trains composed of eight-wheeled standard logging cars * * * when such cars * * * are exclusively used for the transportation of logs." Again the cause for the exception is clear. All over the country there were then, and are now, logging railroads, many of which are interstate in character. We conceive it will not be presumed that the entire devotion of cars to the transportation of logs renders them harmless to men who may have occasion to go between them, or who are required to couple them together. It is scarcely to be supposed that Congress in making this exception did so because it imagined that by devoting cars exclusively to the transportation of

logs they became entirely harmless in character. The exception was made, says common sense, because cars of the described type which were exclusively used for the transportation of logs were used by railroads in a small way of business, whose operations were not of sufficient magnitude to cause Congress to impose the burdens upon them that it had upon other railroads.

The same thought marks the exception added in 1903. It is ridiculous to pretend that Congress imagined that the consecration of cars to street railway service rendered them impotent to harm men who would be required to couple them, or go between them in the discharge of their duties. Congress, we fancy, did not suppose there was some inherent virtue in street railway lines which would render the operation of trains over them innocuous when such operation would be hazardous if on a railway line laid upon a private way. Coupling cars with link and pin couplers is dan

gerous, whether the cars, when coupled, are to be run exclusively upon street railways, or in part upon them, and in part upon a roadbed constructed on private property. Handholds are as essential to the safety of those having occasion to go between cars used exclusively upon street railways as they are to the safety of those who have to go between cars which are only in part used upon such railways. If it be said that Congress made this exception because it was supposed that cars were never run otherwise than singly upon street railways, and therefore there was no need to provide for their equipment with automatic couplers and handholds, it may be asked why, then, Congress thought it necessary to make any reference to them whatsoever, even by way of exception. It never has been held and never will be held so long as reason sways the courts, that a car of any sort and wherever used need be equipped with automatic couplers and with handholds at the end if such car

is not designed to be, and never is, used in connection with other cars. It would be, of course, ludicrous to hold that a car which was never to be coupled to another car need be equipped with automatic couplers, and there can be no occasion for men to go between cars when each car is always operated singly, and therefore there is no occasion to put handholds on such cars. Furthermore, the language of the exception is that thereby there are excepted from the operation of the act, "those trains, cars and locomotives * * * which are used upon street railways." Long before the time it was adopted, also, trains composed of two to five, or even more, cars were habitually run upon the street railway lines of the larger cities, as they are to this day. The reason for this last exception, we insist, is the same as that which incited the previous exceptions, and it rests not in any comparison by Congress of the relative hazard of the operation of the excepted trains and cars with those not

excepted, but upon the ground of the minor character of their operations and the little need there was to regulate them by act of Congress. In 1903 the suburban type of railway, operating on street railway lines over city streets and extending in some instances across the border lines of states beyond the boundaries of cities, was quite common, and it was such railways, we submit, that Congress had in mind and intended to exempt from the operation of the act. And it exempted them, not because the handling of their cars is less hazardous than the handling of cars which do not run upon street railway lines, but because their operations are insignificant in character as compared with the great railroads of the country, and there was not the crying need to guard their operations that existed with respect to larger railroads with their hundreds of thousands of employes.

The record herein discloses another consideration which Congress probably had in mind in

making the exception. Trains and cars which can be run over street railway lines must necessarily be of a radically different type from those which are run on steam railroads, or on any other kind of road which operates exclusively on its own right of way. A car which can be run upon a street railway line cannot depart very far from the street car type. It must not be so large as to occupy an undue amount of the street, and it must be so constructed that it can take the sharp curves where the line swings from one street into another. As an illustration, defendant's trains in passing over the street railway lines to reach its passenger station must negotiate several curves which run from a 36° to almost 100° curvature. The maximum on a railroad operating on its own way is 10°, while not to exceed 4° is the usual curve. Because of the gradual curves, steam roads use cars with square ends, and the end handholds are attached to and project below the end sills on each side of the coupler. The

Interstate Commerce Commission, acting under the authority conferred upon it by Congress in that behalf, has required that all cars subject to the act shall be equipped with that style of handhold. It will be impossible for defendant to comply with that rule and run its trains over its street railway lines, for at each curve on the city streets the handholds would either be broken off or the cars derailed by the couplers striking against them as they swing from one side of the car to the other. With respect to the cars referred to in the last three counts of the complaint, it appears that they are merely large street cars, and their bodies are so low, because of the primary use for which they were designed, that they cannot be equipped with automatic couplers. Those cars are used all the time for street railway purposes, and made the one interstate run because of an extraordinary press of business. If they must be equipped with automatic couplers, then cars designed for street rail-

way use can never be diverted to an interstate run. Yet if the exception is regarded at all, it is apparent that Congress expected that cars used for street railway purposes would be run over interstate highways, and intended that they be exempted from the requirements of the act.

There is such a dissimilarity in conditions with respect to the use of cars upon street railway lines, and their use solely upon a line constructed on a private right of way, as to adequately explain the legislative intent in excepting from the operation of the act such cars as are used upon street railways. If a reason for the exception lies in such dissimilarity, then assuredly it will not do to make the exception read that it is only operative when the cars are exclusively used upon street railways.

But we think all this inquiry into the motives which may have animated Congress to make the exceptions it did is quite irrelevant. Congress has spoken, in clear, unmistakable language, and the

courts are concerned solely with the matter of the speech, and not at all with its inciting causes. The decision of the trial judge cannot be sustained without re-writing the exception; a thing quite beyond the power of the courts, however much they may be impressed with its desirability.

To demonstrate the statement just made. The cars upon which are based the last three counts of the complaint are, as has been noted, mere street cars, used upon all other occasions than the one set forth in the complaint in purely street railway service. No one would have the hardihood to say these are not cars which are used upon street railways, for such was the purpose for which they were designed and such the use to which they are put, day in and day out, year in and year out. The act has provided that cars "which are used upon street railways" need not be equipped with the prescribed appliances even though they are "used on any railroad engaged in interstate commerce." If the ex-

ception stands as Congress wrote it, the cars in question are exempt from the provisions of the act. To penalize defendant because of the use of the cars in question for the carriage of interstate commerce on the one occasion, the exception must be re-written so that it shall read "which are *exclusively* used upon street railways," or "while in use upon street railways." Such re-writing is not permissible unless the courts may say they know better what Congress intended, and are more capable of expressing the intent, than was Congress.

The same considerations affect the question presented under the first twelve counts of the complaint, there being a difference in degree only. The cars there described are devoted to suburban business, but it is an essential part of their use in that business that they be used upon street railway lines. A part of every run they make is over street railway lines. It is impossible to use them upon such

lines if they are equipped as the Interstate Commerce Commission has required. As the exception appears upon the statute books, those cars are as much exempt from the operation of the act as the cars described in the three last counts.

There is no authority bearing directly upon the question presented, but upon principle it does not seem doubtful. The Safety Appliance Act is a remedial statute, and must receive a liberal construction, but in that rule there is no justification for disregarding the plain language of the exception. Had Congress not introduced the exception, the act would have applied to trains and cars used entirely for street railway purposes if they carried interstate commerce. Such was the construction given to the equally general language of the Interstate Commerce Commission Act, which contains no exception, in *Omaha etc. Co. vs. Interstate Commerce Commission,* 191 Fed., 40, in holding that the Commission had jurisdiction to regulate fares

charged by a street railway company for the carriage of passengers on street railway lines from a city in one state to another city in another state. But Congress made an exception to the Safety Appliance Act, and it will not do to disregard it, or, what is the same thing, read words into the exception that make it utterly ineffective. That is what will be done if the exception is read to exempt only trains and cars "which are exclusively used upon street railways," or "while in use upon street railways." We venture there is no railway in the United States engaged in interstate commerce the trains and cars of which are operated exclusively upon street railways. If there is such an one, it is so insignificant that only special search would discover it, and when discovered, it would be found that its trifling traffic was carried on in cars operated singly, which need no exception to take them out of the act. On the other hand, there are many notable instances of railway lines engaged in in-

terstate business whose trains and cars, while running principally upon street railway lines, yet make a part of their run on the private right of way of the company. Such is the case of the Omaha and Council Bluffs street railway line, according to the facts stated in the decision above referred to. Other well known instances are the lines between Davenport, Iowa, and Rock Island, Illinois; St. Louis, Missouri, and East St. Louis, Illinois, and Kansas City, Missouri, and Kansas City, Kansas. No doubt others exist, but these are sufficient for illustration. The trains and cars of those railways run principally over the street railway lines of the cities which are their termini. They may be used in some small degree for carrying passengers within the limits of each terminus. That, however, is but an incident of their principal use, which is to carry passengers from a city in one state into another city in a second state. To handle this traffic they must run a part of the distance between

the two cities upon private right of way. In crossing the interstate bridge, at least, they do so, and in the Omaha case above cited, it appeared that the trains also ran over some other private way. Surely it may not be denied that the trains and cars of those roads are "used upon street railways." Yet they may not be held to be within the exception unless defendant's trains and cars also held to be within it. The difference in the use of the street railways is only of degree. It is as necessary to defendant's train service that they be run upon street railways as it is to the train service of the roads above referred to. It was such lines that Congress had in mind when it adopted the amendment of 1903, and they come within the spirit as well as the letter of the exception, and they may only be put without it by changing the exception that Congress made. To do so is a virtual repeal of the exception, for if it is read to apply only to trains and cars used exclusively upon street rail-

ways, there is nothing that can be found in the United States to come within it.

The court will understand that we make no claim of exemption from the act merely because defendant's road is operated electrically, or because its trains are of the type called interurban. Electricity as a motive power is fast supplanting steam, and there is no indication in the act as it now stands that Congress intended the motive power used to affect the question of whether the act applied or not. Neither does the fact that a road is called interurban affect the question of the application of the act. There are many interurban roads in the United States at the present time whose operations differ little, if at all, from the operation of the steam railroad lines of the country. Many there are whose trains are composed of the same type of cars that are run upon the transcontinental lines, and are equipped, as are those trains, with dining car and sleeping cars. But those trains do not

enter cities over street railway lines. They come in upon their private right of way in the same manner that the great railroad lines of the country do, in obtaining entrance into the cities along their route. Passenger and freight traffic is handled over them in the same manner that it is handled over steam railroad lines. Such roads are in real competition with the large railroad systems of the country, both in volume of business and in conduct, and the same reasons which impelled Congress to regulate the larger railroad systems impel it to regulate such interurban systems. The defendant, it appears, operates freight trains over its line, but those trains are operated as are the trains upon larger railroads. They are run exclusively upon the company's private right of way, and the cars and locomotives and motors used in such operation are not and could not be used upon its street railway lines. We make no claim that locomotives, motors and cars so used are within either the letter

or the spirit of the act. The trains and cars which are used in its suburban, or if you please to term it so, interurban business, are engaged in a very different service. They do substantially an urban business. Outside the city, they make from one to three stops to a mile. Inside the city, they stop at intersecting streets to take on or to discharge passengers. It is immaterial that they do not carry passengers from point to point within the city, and that after they have left the city they run upon defendant's private right of way. They are, nevertheless, "used upon street railways," and such use is an integral and essential part of the only use to which they are devoted. And though they are run over the boundary line between two states, the traffic is *quasi* urban. The service they give, and the nature of their use, differs not at all in kind and but little in degree from the service and use of the trains and cars which are run between Davenport and Rock Island, St. Louis and East St.

Louis, Kansas City, Missouri, and Kansas City, Kansas. If the trains and cars of those roads are excepted from the operation of the act because it is an integral and essential part of their use that they run over street railway lines, then the same exception takes out defendant's cars from the operation of the act.

II.

Expert Evidence Should Have Been Received Concerning the Sufficiency of the Handholds.

If the point urged under the preceding head be ruled against us, and it be held that defendant's cars are not exempt from the operation of the Safety Appliance Act, there still remains for consideration the question whether defendant is not entitled to a new trial because of the exclusion of evidence offered by it tending to prove that the cars referred to in the first twelve counts of the

capable of forming a correct conclusion as was the railroad man of many years' experience in the switching and otherwise handling trains and cars.

We suppose the average man on the street knows that notwithstanding the use of automatic couplers, railroad switchmen, brakemen, and conductors must still go between the cars in making up or breaking up trains. He has probably seen them go between the cars many times in the course of their work. But that is as far as his knowledge goes. He does not know for what purposes they are required to go between the cars, what they are required to do while there, or the positions they must assume while working there. Not knowing those things, he is incapable of forming a correct opinion whether one form of handholds will conduce to their safety while engaged in their work, while another one will not. Undoubtedly any inexperienced man might *guess* as to whether a certain form of handhold would or would not protect the trainmen engaged

in their work between the cars, but how is it possible to say that his guess would be a correct one?

As was well said by Judge Van Devanter in *United States Smelting Co. v. Parry,* 166 Fed., 407, in holding admissible the testimony of a practical brick-mason and builder as to the safety of a scaffold constructed in a particular manner, expert testimony of witnesses possessed of special training, experience, or observation is admissible "when it will tend to aid the jury in reaching a correct conclusion, the true test being not the total dependence of the jury upon such testimony, but their inability to judge for themselves as well as the witnesses." Later on in the opinion, he said:

> "Doubtless the farmers, stockgrowers, merchants, and clerks who composed the jury were more or less capable of judging of the safety of the scaffold in question and of the necessity for securing the planks in one of the modes suggested; but it is quite reasonable to believe that they were not as capable of doing so as a practical brick mason and builder of many

> years' experience in the use and construction of scaffolds, and that the opinion of a witness possessed of the special knowledge which is born of such experience was calculated appreciably to aid them in reaching a correct conclusion.''

It would be quite as reasonable, we think, to say that the average man on the street, entirely inexperienced in railroad work, knows as well as any thoroughly experienced railroad man what has to be done in making up and breaking up trains, and is as competent as the most experienced man to do the work, both with respect to the end to be attained and to his own safety in doing it, as it is to say that one knows as well as the other what form of appliance would be most efficacious for the protection of men engaged in the work, and whether one type was as good for that purpose as the other. The work of the switchman and brakeman is recognized everywhere as one of the most hazardous, notwithstanding the safety appliances now required, in

which men engage. Everyone recognizes that the greenhorn, or inexperienced man, who would plunge into that work would risk his life or limb, and probably be utterly incapable of performing it. What reason is there for saying, these facts being accepted, that the greenhorn, the inexperienced man, knows as well as the skilled and experienced railroad man what appliances are best fitted to preserve the men from danger while they are engaged in this hazardous work? The proposition seems so evident that its mere statement should convict the trial judge of error in rejecting the testimony which defendant offered.

Much more can be produced to convict the trial judge of error than the mere statement of the proposition. In the opinion by Judge Van Devanter, heretofore referred to, a vast number of authorities holding evidence such as this admissible are cited. Other authorities from the federal courts holding such evidence admissible will be

found in:

Hutchinson etc. Co. v. Snyder, 107 Fed., 633.

Wabash etc. Co. v. Block, 126 Fed., 721.

Car Co. v. Harkins, 55 Fed., 932.

Central etc. Co. v. Williams, 173 Fed., 337.

This court had the question before it a number of years ago in *Union Pacific Railway Co. v. Novak,* 61 Fed., 573. There a railroad man was allowed to testify as an expert to the number of brakemen it was necessary to have on a train. The court in recognition of the general rule said:

> "It is undoubtedly true that witnesses must ordinarily state facts, and not give their opinions. Expert and opinion evidence ought only to be received in cases of necessity, in regard to matters which require peculiar skill and knowledge, which are not common to men in general, and without which knowledge the jury would be unable, from the facts, to properly decide the matter. If the relation of the facts and their probable result can be determined without special skill and knowledge, the facts themselves must be given in evidence, and

> the conclusions or inferences must be drawn by the jury."

It held that the matter of the operation of a railroad train, however, was so far outside the knowledge of the ordinary man that the evidence was admissible, and in so holding it quoted from *Railroad Co. v. Bailey,* 11 Ohio St., 335, the following language:

> "That the running and management of railroad locomotives and trains is so far an art outside of the experience and knowledge of ordinary jurors as to render the opinions of persons acquainted with the running and management of such locomotives and trains, as experts, admissible and proper testimony, in proper cases, is very clear on principle, and is so recognized in Quimby v. Railway Co., 23 Vt. 394, and Railway Co. v. Reedy, 17 Ill. 580. See, also, Railroad Co. v. Smith, 22 Ohio St. 227."

In *Chicago etc. Co. v. Price,* 97 Fed., 423, the Circuit Court of Appeals for the Eighth Circuit held that a locomotive engineer might testify that the

rough and uneven condition of a railroad track would be likely to cause a coupling pin to be thrown out while a train was going down grade over such track. Said the court:

> "It is not probable that the farmers, mechanics, and business men who composed the jury in this case were as capable of forming a judgment upon the effect of a rough railroad upon the links and pins with which the cars of a freight train are fastened together as a locomotive engineer who has been operating a railroad train for years. Motey v. Granite Co., 36 U. S. 682, 689, 20 C. C. A. 366, 370, 371, and 74 Fed. 155, 159; Railway Co. v. Edwards, 49 U. S. App. 52, 56, 24 C. C. A. 300, 302, and 78 Fed. 745, 747; Fireman's Ins. Co. v. J. H. Mohlman Co., 62 U. S. App. 287, 291, 33 C. C. A. 347, 349, and 91 Fed 85, 87; Clifford v. Richardson, 18 Vt. 620, 627."

In *Pittsburgh etc. Co. v. Lamphere,* 137 Fed., 20, the Circuit Court of Appeals for the Third Circuit held that an experienced railroad man might testify what, in his opinion, good railroading required with respect to the location of tell tales on

each side of overhead bridges.

In *Chicago etc. Co. v. Hale,* 176 Fed., 71, the Circuit Court of Appeals for the Eighth Circuit held that an experienced brakeman might testify as to how many brakes would be required in order to safely handle cars passing over a certain track, saying:

> "The general rule is that witnesses must testify to the facts within their knowledge, and that they may not state their opinions. But there is a well-established exception to this rule to the effect that the opinions of witnesses who possess peculiar skill or knowledge may be received when the facts are such that persons without such skill or knowledge, and presumptively the jurors, are likely to prove incapable of forming a correct judgment relative to the matter in hand without the aid of such opinions. Chicago Great Western Ry. Co. v. Price, 97 Fed. 423, 426, 38 C. C. A. 239, 242; Lake v. Shenango Furnace Company, 160 Fed. 887, 894, 88 C. C. A. 69, 76; United States Smelting Co. v. Parry, 166 Fed. 407, 411, 92 C. C. A. 159, 163."

Coming to a strictly analogous case, it was held

in *Wabash etc. Co. v. United States,* 168 Fed., 1, that upon the trial of the case under the Safety Appliance Act an expert trainman, having testified as to the condition of a coupler, might also testify as to what was necessary in order to operate that coupler. To quote:

> "An expert trainman, after describing the broken condition of a coupler, was asked:
> 'In the condition in which that coupler was on that end of the car at that time, what was necessary in order to operate the coupler?'
>
> He answered:
>
> 'It would necessitate a man going between the ends of the cars and taking the part of the chain that was left with the coupler to operate that coupler.'
>
> The question was objected to on the ground that it called for a conclusion and invaded the province of the jury. In our judgment the mode of operation of automatic coupling mechanism and the effect of various conditions thereof were proper subjects for expert testimony."

We fancy it will be something more than difficult

to draw a distinction between a ruling that when the condition of a coupler has been described, an experienced trainman may state what is necessary in order to operate the coupler, and a ruling that an appliance upon a car being described, an experienced trainman may testify whether that appliance would serve the purpose of a handhold in protecting trainmen from injury while engaged in work between the cars. That was the fact we attempted to show, and we based our claim of right to show it upon what seemed to us the patent fact that an inexperienced man could by no possibility form so good an opinion as a thoroughly experienced man as to the sufficiency of such an appliance.

Turning from the federal decisions, the rule above invoked is found iterated and reiterated in the decisions of the state courts.

In *Ft. Worth etc. Co. v. Wilson* (Tex.), 24 S. W., 686, witnesses experienced in railroad work and particularly in the work of keeping roadbeds and

tracks in condition were permitted to testify that a certain track was not properly constructed.

The same ruling was made in *Colorado etc. Co. v. O'Brien* (Colo.), 27 Pac., 701, upon the ground that "the question was one of science, skill, and experience, and therefore proper for the opinion of an expert, based, if necessary, upon a hypothetical question properly framed."

In *Louisville etc. Co. v. Frawley* (Ind.), 9 N. E., 594, it was said:

> "The plaintiff was permitted to prove by witnesses, who were admitted to testify as experts, the relative manner of coupling cars equipped with single and double dead-woods, and also that the coupling of cars equipped with the latter is attended with more danger than is the coupling of those supplied with single dead-woods. This, it is contended, was not a subject requiring special skill or study, and hence not one upon which it was proper to take the opinion of witnesses. In each instance the witnesses were first asked to describe with some minuteness the difference in

the construction and the process of coupling of cars equipped with double or single dead-woods. With this description and preliminary explanation we have no doubt of the propriety of the evidence. Even non-expert witnesses may give their opinions, in a proper case, where such opinions are based upon facts and observations detailed to the jury. Carthage etc. Co. v. Andrews, 102 Ind. 138, S. C. 1 N. E. Rep. 364, and cases cited.

Speaking upon this subject, the supreme court of Iowa said, in a case closely analogous to this: 'The construction of cars, the mode of operating them, and the effect of a particular thing on their safety and usefulness, is a habit, study or science. * * * The ordinary jury would not know the effect of these double dead-woods.'

The testimony received was within the rule that where the question under investigation so far partakes of the nature of a science as to require a course of study, or a previous habit of special practice, in order to the attainment of a correct knowledge of the subject, the opinion of witnesses competent to speak should be received.''

In *Neubauer v. N. P. R. Co.* (Minn.), 61 N. W., 912, it was held proper to admit expert testimony

to prove that large ice-tongs were defective and in what respect upon the ground that such tongs "are not in such common use that the proper manner of constructing them is a matter of such common knowledge as to preclude the use of expert testimony as to the same."

In *Louisville etc. Co. v. Hall* (Ala.), 6 So., 277, it was held that an expert railroad man might testify as to his opinion, and his reasons, as to the merits or demerits of whipping straps as cautionary signals on an approach to an overhead bridge.

In *Betts v. Railway Co.* (Iowa), 60 N. W., 623, it was held that a witness might testify as to whether a car furnished for the shipment of stock was reasonably safe for that purpose.

In *Baltimore etc. Co. v. Leonhardt* (Md.), 5 Atl., 346, it was held that a mechanic might testify as to what contrivances would have rendered a car safe while passing over a certain bridge.

In *Louisville etc. Co. v. Davis* (Ala.), 12 So., 786, it was held that an experienced railroad man might testify whether a man with one arm would be as good and competent a brakeman as a man with two arms.

In *Birmingham etc. Co. v. Wilmer* (Ala.), 11 So., 886, it was held that a brakeman might testify that in his opinion a train was started with an unusually hard jerk.

In *Louisville etc. Co. v. Binion* (Ala.), 18 So., 75, it was held proper to inquire of an expert whether, when a brake becomes tight after it is set, it does not throw off with greater force than usual.

In *Whitsett v. Railway Co.* (Iowa), 25 N. W., 104, an expert witness was permitted to testify that if the motion of an engine is suddenly increased after the speed of a train has been checked with the brakes, it will cause a more or less violent jerking of the train, by which coupling links and

pins might be broken.

In *Reifsnyder v. Ry. Co.* (Iowa), 57 N. W., 692, it was held that expert evidence is admissible to show that in making a flying switch, the proper position of the brakeman is at the brakes.

In *Schroeder v. Ry. Co.* (Iowa), 103 N. W., 985, it was held that the question whether switch frogs are dangerous when unblocked is a proper subject for expert testimony.

In *Missouri Pacific Ry. Co. v. Fox* (Neb.), 83 N. W., 744, it was held that a yardmaster of a railroad company who had been a switchman and brakeman and handled cars of all sorts might testify as to the mode of construction of parts of a car, and express an opinion thereon as to what is proper or improper construction.

In *Jones v. Shaw* (Tex.), 41 S. W., 690, it was held that the conclusions of an expert in building and repairing railroad cars is admissible on the

subject if they are offered as expert testimony.

In *Galveston etc. Co. v. Pitts* (Tex.), 42 S. W., 255, where the issue was the defendant railroad company's negligence in failing to maintain a safe track, opinion evidence as to how the track could be made safe was held admissible.

In *International etc. Co. v. Mills* (Tex.), 78 S. W., 11, it was held that in an action by a brakeman to recover damages for personal injuries alleged to have been caused by the defective condition of the air hose, that a question as to what it would indicate as to the condition of the hose if it was jerked out of the brakeman's hand as he went in to uncouple it after cutting off the air at the angle cock, was a proper subject for expert testimony.

In *Huggins v. Railway Co.* (Ala.), 41 So., 856, expert evidence was held admissible as to what cars could be coupled without going between them, and with respect to the particular cars which were the

occasion of the injury upon which the action was based, that it was proper to testify that the cars could have been coupled without the plaintiff going between them.

The foregoing collection of cases is by no means a complete list of the cases that might be gathered upon the subject, even with respect to railroad work. We confined our citations to cases involving railroad work, not because there is anything peculiar to the rule which we invoke as applied to railroad work, but because they illustrate that railroad work is universally recognized by the courts as work which requires peculiar skill and experience, and has to do with matters of which the average men who make up our juries have no knowledge. The rule which we invoke, and which governs them as it does all other cases with respect to expert evidence of the sort which we tendered, is stated in peculiarly excellent fashion in *Taylor v. Town of Monroe,* 43 Conn., 36, where it was said of the

subject:

> "The rule as to experts is, that 'in cases involving questions of science and skill, or relating to some art or trade, experts are permitted to give opinions; the principle embraces all questions except those, the knowledge of which is presumed to be common to all men. So the business which has a particular class devoted to its pursuit, is an art or trade within the rule.' Rochester & Syracuse R. R. Co. v. Budlong, 10 Howard's Pr. Rep. 289.
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> * * * * * * * *
>
> The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue."

Applying this language to the matter under discussion, railroads are not uncommon things. Nearly all persons have some knowledge of railroads and their operation. But few persons, if

any, engaged in other occupations than railroad work, have any knowledge as to the appliances necessary, and as to the methods of doing the work. No sane man wholly without experience would undertake to go into a switch yard and engage in the making up or breaking up of a train, coupling and uncoupling the cars and air hose, and going between the cars for all purposes that are necessary in such operations. If he would not undertake that work because he knew himself unfit for it, because of his ignorance of the nature and use of the appliances, what excuse is there for saying that he is as competent as any experienced railroad man to determine whether or not the appliances which a railroad company has furnished for the protection of its employes in doing the work are well calculated to protect them from injury, and superior for the purposes for which they are intended to other appliances furnished by other railroad companies and approved by the Interstate Commerce Commis-

sion? The proposition, we submit, is self-evident. Railroad work is skilled work, and the men who for years have been engaged in it do possess "peculiar knowledge or experience not common to the world," and this "renders their opinions founded on such knowledge or experience" unquestionably of "aid to the court or the jury in determining the questions at issue."

That the exclusion of the proffered testimony was prejudicial to defendant cannot be doubted. The record shows that we offered to prove the sufficiency of the handholds on defendant's cars, and their superiority to the types in common use, not only by the two witnesses called, but by other witnesses, men of long experience in railroad work and in the handling of cars. The jury, we cannot doubt, would not have undertaken to measure their opinion, unaided by skill or experience, against the opinion of skilled and experienced railroad men. Even if their observation of the cars inclined them,

as it undoubtedly did from the nature of the verdict returned, to believe that better and safer appliances might have been used, yet it is scarcely to be doubted that they would have deferred to the opinion of those skilled and experienced in the business. In any event, if the evidence was admissible defendant was entitled to its benefit before the jury.

There is no question of discretion involved. There is no question of the competency of the witnesses to testify. The trial judge held, as matter of law, that the question was one of common knowledge concerning which one man knew as much as another, and that therefore expert testimony was not receivable. If he was mistaken in that view of the law, as the authorities we have cited conclusively prove him to have been, then the cause must be remanded for a new trial with instructions to admit all such evidence as may be proffered by either party.

We urge upon the court, therefore:

First, that trains and cars used and operated as are defendant's are excepted from the operation of the Safety Appliance Act by the exception incorporated in the amendment of 1903, and that defendant is therefore entitled to a remand of this cause with directions for its dismissal; and

Second, that if that point be ruled against us, defendant is entitled to a new trial upon the first twelve counts of the complaint because of the rejection of the evidence tending to prove that the cars which are the basis for those counts were equipped with sufficient handholds.

Respectfully submitted,

GRAVES, KIZER & GRAVES,

Attorneys for Plaintiff in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

SPOKANE & INLAND EMPIRE RAILROAD Company, *Plaintiff in error,*
v.
UNITED STATES OF AMERICA, *Defendant in error.*
No. —.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

(Parties will be referred to herein as in plaintiff in error's brief; i. e., the plaintiff in error as defendant and the defendant in error as plaintiff.)

This proceeding, begun in the District Court of the United States for the Eastern District of Washington, Northern Division, in which the United States of America was plaintiff and the Spokane & Inland Empire Railroad Company defendant, was instituted for violation of the act of Congress known as the safety-appliance act, approved March 2, 1893 (27 Stat. L., 531), as amended by an act approved

April 1, 1896 (29 Stat. L., 85), and as amended by an act approved March 2, 1903 (32 Stat. L., 943).

The declaration contained 15 counts, the first 12 alleging that defendant used in interstate commerce certain cars on specified dates when the grab irons or handholds were missing from the ends of the cars, while the remaining 3 counts charged that defendant used in interstate commerce certain other cars not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of men going between the ends of the cars, the apparatus used consisting of what is known as the link-and-pin coupler. In its answer as to the latter three counts, defendant denied that the handholds were missing, but did admit the use of the link-and-pin couplers. It further pleaded as to all counts that the cars described were used on street railways and were therefore not amenable to the law. Issue being joined, the cause came on to trial, and the jury returned a verdict for plaintiff as to the first 12 counts and a like verdict, by direction of the court, as to the 3 remaining counts.

The facts of record are set forth in the brief of defendant in extenso, and therefore a brief summary will suffice here for the purposes of this discussion.

Defendant owns and operates by electricity a street railway system in Spokane, Wash., and several suburban and interurban lines, including one to Coeur d'Alene, Idaho. Between Spokane and Coeur d'Alene it runs regularly scheduled trains, controlled

by train dispatchers and telegraphic orders, governed by train rules, making stops at distances varying from one to the mile to three to the mile, on which passengers and property are transported. Within the limits of the city of Spokane these cars run upon the tracks of the street railway company for a distance of about a mile and a quarter to reach, via the most direct route, defendant's passenger depot, located in the central part of the city, making stops to take on passengers going outside the city and to discharge passengers coming into the city, but not to carry passengers from point to point within the city. Outside the city defendant owns its private right of way. The cars described in the first twelve counts of the complaint were run between Spokane and Coeur d'Alene in trains consisting of two or three cars coupled together, using the city tracks and private right of way as above outlined, when, it is charged, they were not equipped with grab irons or handholds as required by law. The ends of these cars are more or less rounded so that the cars can negotiate short turns. On the upper side of this rounded buffer or sill, on either side of the coupler, about 25 or 26 inches from the center of the car, there is an opening $22\frac{1}{2}$ inches long, $2\frac{1}{2}$ inches wide, and $3\frac{1}{2}$ inches back from the front of the buffer. Immediately below this buffer a radial coupler swings from one side of the car to the other, across the entire front of the car, so as to enable it to make short or extreme curves in turning corners in the city streets. On cars used on

steam railroads the buffer beam is practically square, and ordinarily the grab iron or handhold is attached to and projected outward or downward from the face of the buffer so that it is within the sight and reach of men going between the ends of the cars to couple and uncouple air hose and for other purposes. The objection to this sort of a grab iron on the cars in controversy is that it would interfere with the radial coupler in making the swing at curves.

The cars referred to in the last three counts were described as ordinary street cars which had been temporarily taken out of street railway service, coupled together with link-and-pin couplers and run as a solid train from Spokane to Allen, Idaho, and return, the violation charged being that they were not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of men going between the ends of the cars.

The case now comes to this court on the following specifications of error:

SPECIFICATIONS OF ERROR.

First. The action of the court in sustaining plaintiff's objection to the question asked the witness Robertson with respect to the openings in the buffers or sills of the cars referred to in the first twelve counts of the complaint, which are claimed by defendant to be handholds, viz:

> What would you say of them as a safe and proper appliance, one that would tend to preserve men from injury who might have to go

between the cars for any purpose? (Rec., p. 57.)

Second. The action of the court during the examination of the witness Robertson in rejecting the following offer of proof:

> Now, if your honor pleases, I offer to prove by witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve the same purpose, and does subserve the same purpose, as the round iron appliance that is prescribed by the rules of the Interstate Commerce Commission at the present time and is in use on steam railroads, that it is a better appliance than these are for the purpose of protecting men from injury who have to go between the cars. I offer to prove that and to ask questions of this witness to that effect. (Rec., pp. 57–58.)

Third. The action of the court in sustaining plaintiff's objection to the question asked the witness Mahan with respect to the openings in the sills of the cars, to wit:

> Does that opening in the top of the sill serve the same purpose and is it as well fitted for the purpose of protecting the lives and limbs of men who have occasion to go between the cars in the exercise of their duties as the form of grab iron that is used on steam cars, that is

> brought below the end of the car? (Rec., p. 59.)

Fourth. The action of the court in sustaining plaintiff's objection to the question asked the witness Mahan with respect to the openings in the sills of the cars:

> In your opinion, Mr. Mahan, and observation of these cars, is the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those that are used upon steam railroads? (Rec., p. 60.)

Fifth. The action of the court in rejecting defendant's offer to prove, during the examination of the witness Mahan, as follows:

> I now offer to prove by this witness, and also by other witnesses called, with your honor's permission, that the opening in this angle iron or sill or buffer is a better and safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grab iron or handhold that is known in railroad circles. (Rec., p. 60.)

Sixth. The action of the court in denying defendant's challenge to the sufficiency of the evidence at the close of all the evidence, and in denying defendant's motion for a nonsuit, and that the cause be taken from the jury and the action dismissed upon all of the counts. (Rec., p. 61.)

Seventh. The court's action in denying defendant's motion that in the event, and only in the event, that

the court denied the motion to dismiss as to all the counts, that it dismiss as to the last three counts of the complaint, those that charged a failure to equip cars with automatic couplers. (Rec., p. 61.)

Eighth. The court's action in refusing defendant's request to instruct the jury as follows:

> The plaintiff herein has not made out a case against defendant on any of the causes of action stated in its complaint, and you will therefore return a verdict in defendant's favor. (Rec., p. 62.)

Ninth. The action of the court in denying defendant's motion to enter judgment in its favor dismissing the action and for costs, notwithstanding the verdict returned by the jury, for the reason that the verdict is contrary to law and to the undisputed evidence in the case, and that under the law and the facts defendant was entitled to judgment. (Rec., pp. 27–33.)

Tenth. The action of the court in denying defendant's petition for a new trial for the reasons and on account of the matters set forth in such petition. (Rec., pp. 34–38.)

Eleventh. The action of the court in entering judgment upon the verdict against defendant. (Rec., pp. 39–40.)

ARGUMENT.

The above assignments involve these questions: First. Are the cars in controversy "used upon street railways?" Second. Are the openings in the buffer beam grab irons within the meaning of the safety-

appliance act? Third. Did the trial court err in refusing to admit expert testimony as to the merits of the openings in the buffer beams as a means of protection to men who may be required to go between the ends of the cars in the course of their employment?

I.

Are the cars in controversy "used upon street railways"?

The discussion of this question applies to assignments Nos. 6, 7, 8, 9, 10, and 11, which call for determination of the question whether these cars are used on street railways within the meaning of the act and are thus exempt from the provisions of the safety-appliance act.

The first section of the amended act of 1903 reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions and requirements of the act entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia, and

> shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as a mended by the act of April first, eighteen hundred and ninety-six, *or which are used upon street railways.*

The object of the act is to lessen the danger and risk to which men engaged in the hazardous occupation of railroading must subject themselves. Its primary purpose was to increase the safety of employees and travelers. (*Johnson* v. *Southern Pacific Company*, 196 U. S., 1.) We respectfully submit, therefore, that the trial court was correct in saying that the "object of the act is to protect those engaged in hazardous occupations" and in construing it accordingly. "This act is a remedial statute, and it is the duty of the court to so construe its provisions as to accomplish the intent of Congress—to protect the lives and limbs of men engaged in interstate

commerce." (*U. S.* v. *Central of Georgia Ry. Co.*, 157 Fed. Rep., 893, 894.)

Defendant contends that the cars involved in this prosecution are exempt from the application of the safety-appliance acts by reason of the exception of trains and cars used upon street railways. This contention is predicated upon the fact that these cars run upon the street railway tracks while entering and departing from the city of Spokane, for a distance of about a mile and a quarter. The lines on which the cars in controversy run are between Spokane, Wash., and Coeur D'Alene, Idaho, and are called the interurban line, and are operated by electricity.

> The company owns the city lines known as the Spokane Traction Company within the city limits, and one suburban line running out to Opportunity. Its passenger station is located at the corner of Maine and Lincoln, very close to the center of the business part of the city. From the freight yards of the company, the passenger station is reached by all interurban trains by leaving the freight yards where they intersect Market Street, using Market Street to Maine Avenue, Maine Avenue to Lincoln, and Lincoln into the depot. * * * (Rec., p. 51.)
>
> On the interurban lines tickets are sold for particular stations, the same as a railroad. We handle baggage for our passengers. Our trains are made up according to standard railroad rules with markers to designate the trains

> and are run on schedules and by train orders. The employees who are engaged in the street-car service do not have anything to do with the operation of the interurban service. They use the same tracks, however, that come from the freight depot to the passenger terminal in the heart of the city. We do not take passengers on the interurban trains within the city limits exclusively. We receive passengers at points within the city limits for transportation outside and drop passengers on the interurban trains at various points within the city. But within the city limits we do no strictly street car business. * * * (Rec., p. 54.)

The question at issue is the construction to be given to the words "or which are used on street railways" in section 1 of the safety appliance amended act of March 2, 1903 (32 Stat. L., 943, c. 976).

Salient facts as indicated by the testimony which distinguish the railroad here from a railway such as the statute describes as a street railway:

1. This railway passes over the streets *only* to reach its terminal station in the heart of the city.

2. No local passengers are received and delivered in the city of Spokane.

3. The most direct route is taken into and out of the terminal station.

4. The tracks laid in the streets of Spokane on this direct route for the out-of-State trains are not used by these trains for any of the purposes of a street railway.

5. Passengers on trains in which the cars in question are used travel on tickets from station to station in the same manner as on the steam railroads of the country.

6. Trains in which these cars are used handle baggage in the same manner as steam railroads, in contradistinction to street railways.

7. Trains in which these cars are used run outside the city limits on same tracks which are used for regular freight trains.

8. These cars are of the height of standard cars as distinguished from the low cars used on street railways.

9. These trains are operated according to American Railroad Association Code of Rules in effect on steam railroads of the United States.

10. These trains are run on schedule time and their movement is controlled by train orders issued presumably by a train dispatcher.

11. There is a distinct segregation of the interurban business of this railroad from its street railway business. Employees are distinct and method of operation is distinct. These interurban cars perform no street car service.

12. The distance over which the through trains pass over street tracks to reach terminal is so inconsiderable in comparison with the whole distance covered by these trains as to make it a minor incident of the journey taken as a whole.

The defendant is an interurban electric railroad operating trains of cars of standard height and

gauge and running through the country from town to town over its own right of way for substantially all its mileage between fixed stations in different States, and hauling passengers, freight, and express for long distances at high speed. It handles interstate passengers required to have tickets for their particular destination. Its trains are operated by the train-order system over tracks generally used for interstate freight and passenger traffic. Its interurban trains pass over tracks laid in the public streets for about 3 per cent of their run to reach the terminal station of such railroad in the heart of the city of Spokane, and such tracks are also used by street cars of the same company.

The line from Spokane to Coeur d'Alene, on which the cars in question were used, was not in any sense a street railway. It did not become such when, in approaching its terminal station in the heart of Spokane, it took the most direct route over some city streets and used tracks which were also used by a street railway. The distance over city street tracks was comparatively of minor consequence when the distance from Spokane to Coeur d'Alene, of which the court may take judicial notice is taken into consideration.

Contemplating the purpose and object of this statute it is not possible to give the act a construction consistent with this avowed purpose and permit that which is a mere subordinate and minor incident to the operation of this line to effect the whole interstate railroad running for 40 miles over

tracks laid on its own right of way, used for the general purposes of freight and passenger traffic.

A car is not "used upon a street railway" when as one of its minor incidents it uses tracks *over which cars used upon street railways also run.* The trains in question were interurban trains. The cars were interurban cars. They do not become cars used upon a street railway by a trifling and minor use of tracks over which cars also run which are used upon a street railway.

The exception in the statute as to cars used on street railways was intended to apply only to the ordinary urban street railway which was at the time of the passage of the act a local railway not endowed with the power of eminent domain but running in city or town streets.

But there is a wide line of demarcation between such a street railway then known and a great commercial interurban railroad such as the one in question here. There are three general classes of railroads, viz, street railroads, steam railroads, and interurban electric railroads.

Trains operating on railroads of the third class above named are within the scope of the safety-appliance acts when engaged in interstate traffic and do not escape regulation by an exception intended only to cover railroads of the first-named class.

In *United States* v. *Atchison, T. & S. F. Ry. Co.* (220 U. S., 37) Mr. Justice Holmes, in delivering the unanimous decision of the court, said, with reference

to the words "continuously operated night and day office," in the Federal hours of service act:

> A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent.

By a parity of reasoning where for about a mile tracks of a street railway are used in a journey of more than forty miles, such a "trifling" use of street tracks would not take the cars used in the entire journey out of the operation of the safety-appliance acts which would otherwise be applicable.

This is especially true in view of the fact that the safety-appliance act is a remedial statute to be construed so as to accomplish the intent of Congress (*Johnson* v. *Southern Pacific Co.*, 196 U. S., 1; *U. S.* v. *Central R. R. Co., D. C.*, 157 Fed., 893), and that its provision should not be taken in a narrow sense (*Schlemmer* v. *R. R. Co.*, 205 U. S., 1, 10), nor its undoubted humanitarian purpose frittered away by a judicial interpretation which will permit any trunk line of railroad to escape from the obligation of compliance *by running for a short distance over tracks in a street which are also used by a street railway.*

The consequences of a determination favorable to the contention here made by the defendant railroad would be serious and disastrous. Any great railroad system could then voluntarily relieve itself from the obligation of the safety-appliance act by merely run-

ning street cars for a short distance over its tracks in any of its terminal cities. Then, through passenger trains on the Northern Pacific from Seattle to St. Paul need not be equipped with safety appliances if that railroad, for a short distance within the limits of Spokane, operated a few street cars over the same tracks as those used for such through trains.

The New York, New Haven & Hartford system could run its express passenger and freight trains from Boston to New York without safety appliances merely by using a portion of its tracks operated for street-car service in any city through which it passes.

The Illinois Central system, operating trains from Chicago to New Orleans, could escape the law by the same method. The safety-appliance laws would be a nullity and the whole purpose of Congress in its enactment defeated.

But it can not be the true construction of the act of 1903 that the running of trains for one block or for one mile over tracks which are used for street cars will take out of the operation of the law interstate railroad trains which would otherwise be within its scope.

In the judicial determination of the line of demarcation between State and Federal power, the latter is not to be denied because there is somewhere in its exercise a remote incidental infringement upon the former. (See *Wheeling Bridge case*, 18 How., 421, 433; *The Katie*, 40 Fed., 480, 493; *U. S.* v. *Colorado & Northwestern R. R.*, 157 Fed., 321, 330.)

As an intermingling of intrastate traffic with interstate traffic does not defeat the exercise of the con-

gressional power over the latter (*Baltimore & O. R. Co.* v. *Interstate Com. Com.*, 221 U. S., 612; *Southern Ry. Co.* v. *U. S.*, 222 U. S., 20), so the trifling intermingling of street car traffic with the traffic of a great interurban interstate railroad does not operate to relieve the latter from the requirements of a statute which but for such intermingling would be applicable.

If this is the true rule for the interpretation of the Constitution, and the Supreme Court has so declared, can there be any mistake made by the application of the rule to the interpretation of a statute enacted under the clause in the Constitution to which this construction has been given?

As to the trains here in question the defendant operates what is commonly known as an interurban railway, and on this railway its business is to transport passengers and property between points in two States, but does not do a street railway business, i. e., carry passengers between points within the city, either principally or incidentally.

"Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between States,' 'between States and Territories,' 'between the United States and foreign countries.'" (Lamar, Justice, in *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission*, Supreme Court, June 9, 1913.)

Primarily, a street railway is one constructed on and along the streets for the carriage of persons from one point to another in a city, with cars stopping at short intervals for the receipt and discharge of passengers. (*Hannah* v. *Metropolitan Street Ry. Co.*, 81 Mo. App., 78.)

"Used on a street railway," as these words appear in the proviso, do not cover cars hauled in trains on an interstate railway. They refer exclusively to cars limited in their use to street railway use. Trains hauled a short distance over street car tracks are not used on a street railway, for they are not used in street railway traffic; they are not used as street railway cars; they are not built as street railway cars; their use is not street car use.

Their use is in train service, not in street car service. Their use is one which the defendant's proof shows is segregated from the street car service which uses these same tracks.

1. Employees used in one service not used in the other.

2. Cars are of different size and construction.

3. No baggage carried on street cars, while these trains have regular baggage cars for passengers' luggage.

4. Trains in the interurban service and single street cars alone in the street-car service conducted as such.

5. Passengers on the interurban service are ticketed to stations.

In other words, the use of the street car tracks by the interurban line is a mere minor incident and in no manner changes or affects those great general conditions which constitute this interstate line from Spokane to Coeur d'Alene, a railroad in contradistinction to a street railway.

It is as long as the old Boston & Providence line and longer than the first New England Railroad between Boston and Lowell.

Except as to motive power, *it bears all the marks of a railroad* as that term is broadly used in decisions and in statutes. The defendant in its brief (p. 44) repudiates any exemption because road is operated electrically.

The difficulty alleged in the railroad brief as to curves is not at all insuperable. Similar service in Portland, Oregon, has by a simple mechanical device overcome this difficulty so that in making curves these buffers do not come in contact and handholds are in their proper place as required by law.

The defendant's contention that the act does not apply to cars that are at all used upon street railways, no matter how trivially or incidentally to their principal employment, is not in consonance with the purpose and intent of Congress.

In the case of *Moore et al.* v. *American Transportation Co.* (24 How., 1) the Supreme Court of the United States had before it the construction of a statute of March 3, 1851, which provided "That this act shall not apply to the owner or owners of any

canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." In construing the phrase "used in rivers or inland navigation," the court said:

> This word "used" means, in the connection found, "employed" and doubtless, in the mind of Congress was intended to refer to vessels solely employed in rivers or inland navigation.

So here, contemplating the purpose and object of this statute, it is reasonable to suppose that Congress intended to exclude from its operation only such cars as are used solely on street railways.

In *Union Mutual Accident Assn.* v. *Frohard* (134 Ill., 228; 25 N. E., 642; 10 L. R. A., 383) the Supreme Court of Illinois held that where a hardware merchant, insured in an accident association, was accidentally killed while hunting, for recreation, his widow, the beneficiary named in the policy, was not prevented from recovering the full amount of the insurance by reason of a by law of the association and clause in the policy to the effect that when any member is fatally injured while engaged temporarily in any act or occupation more hazardous than the one in which he was accepted, the amount to be paid shall be equal to the rate of the occupation in which he was engaged when receiving the injury, although the amount to be paid in the case of a hunter is less according to the by laws than in the case of a hardware merchant.

In *Erriccson* v. *Brown* (38 Barb., 390) the Supreme Court of New York passed upon a similar question

in construing a statute enacting a personal liability of stockholders in a steamship company for the labor of "laborers and operatives." Brown, a civil engineer, who had rendered services and manual labor combined, was said by the court to be without the pale of the statute. Justice Peckham, speaking for the court, at page 392, said:

> Could it be contended that the plaintiff would be included in such an enactment under the word laborer? I think not. He would no more be included than a lawyer who rendered professional service. * * * Each may involve some manual labor, but that is the incident rather than the principal of service.

We respectfully submit, therefore, that the assignments Nos. 6, 7, 8, 9, 10, and 11 are not well founded in point of law, and that the trial court did not err in refusing to hold that the cars in question were used on street railways within the meaning of the safety-appliance law.

II.

Are the openings or depressions on either side of the buffer beam handholds within the meaning of the safety-appliance act?

If our contention that all these cars are amenable to the safety-appliance law is sustained, it then becomes necessary to ascertain whether they were equipped with handholds and couplers as required by the act. The first twelve counts of the declaration charge that the cars named were not equipped

with grab irons or handholds and the last three counts charge failure to use automatic couplers.

It is contended by defendant that certain openings in the buffer are handholds within the meaning of the act.

The act refers to handholds or grab irons. This means the specific device known as such which was in general use at the time of the passage of the act.

Nothing in the terms of the act specifically authorizes *any substitute therefor.*

The charge of the court was especially favorable to the plaintiff in error in that it laid down that the requirement of the statute was met by some such appliance which will afford equal security with the appliance technically known as a grab iron or handhold.

Now the statute requires that the device known as a grab iron or handhold be applied to the car.

It was an appliance so well known that Congress referred to it by name.

It was a device of such a shape that it could be grabbed or grasped by the hand.

The device which the plaintiff in error contended could be used as a grab iron was never built or made or constructed for *that purpose,* as witnesses for this railroad testified. (Rec., p. 50.)

But plaintiff in error claims it would serve.

There was no contention in behalf of this railroad that the device on these cars *was* in fact a handhold

or grab iron or was built or constructed for that purpose. Defendant's superintendent (Rec., p. 54) never heard anyone describe these openings as a handhold. Nor was its location as convenient for use as the location of grab irons generally used on railroads.

The device on these cars is manifestly far out of reach instead of being readily at hand for use as is the device recognized under the name of grab iron.

Defendant's own superintendent testified (Rec., p. 55):

> I don't believe I could get much more than the ends of my fingers up there myself.

WHEN A HANDHOLD IS NEEDED, EVERY INCH COUNTS.

To reach the device on these cars, an employee who was between cars coupling up or uncoupling air hose when a train for any reason happened to start or move, would have to reach up for a full arm's length, turn his wrist around the top of the car buffer, reach in for $2\frac{1}{2}$ or 3 inches, then turn his fingers into a mere depression in the top of the buffer.

The opening in the buffer or sill was about 25 or 26 inches from the center of the car. (Rec., p. 49.) It is from $2\frac{1}{2}$ to $2\frac{3}{4}$ inches wide, and there is one of such openings on each side of the drawbar. If the car starts, he has to reach up 37 or 38 inches from the ground to get to the top of the end sill, and has to place his hand $3\frac{1}{2}$ inches over the top of the sill if he

reaches the opening, and then turn it an inch or three-quarters before he can get enough to grab on. (Rec., p. 55.)

This is a radical difference from the grab iron as generally located, where it may be grabbed in one movement and is readily at hand in any emergency. The railroad here undertakes to establish that a hole in the top of the buffer so far away that an operator can only get the ends of his fingers in it with great effort may be considered a legal equivalent to the well-known device which may be grasped by the hand.

When working at air hose, the well-known grab iron is within sight of the railroad man. The alleged substitute therefor on this railroad is not in his sight. He has to take his chances of reaching it without the guidance of his sight.

It is out of reach. It can not be grasped or grabbed, or seized by the hand. It provides only a finger hold even when reached, and on baggage cars it is not even present.

A handhold or grab iron proper may be firmly grasped within the hollow of the hand with the fingers firmly gripped around it.

Such a safeguard is for emergency use, and when such an emergency arises the menace is necessarily urgent, involving danger to life of the employee at work between the cars.

As said by the judge of the district court in this case (Rec., p. 37):

> The purpose of the handhold is obvious. As declared by the statute, it is for the greater security of men in coupling and uncoupling cars. In order to subserve that purpose it must be located so that it can be seen, and it must be of such form and size that it can be readily seized in an emergency.

The device in use in these cars was not built or intended for a handhold. The resident engineer of the defendant company testified (Rec., p. 50):

> The cars were not made according to my designs, and I do not know whether the openings were constructed for any particular purpose.

The general foreman of defendant company testified (Rec., p. 61):

> The grab-iron or handhold used on steam railroads is a long piece of metal affixed to the end of the sill projecting downwards *so that it can easily be grasped by the hands. There is nothing like that on these cars.*

The device on these cars was objectionable not only because of its comparative inaccessibility; because of its being out of sight of the employee; because it was not designed or constructed or intended for handholds; because its form was such that it could not be grabbed or grasped; and it was further objectionable in that there was no such uniformity even on the cars on this line as would make it of use in emergency service.

III.

Did the court err in rejecting the testimony of experts that the depression or opening in the end sill would afford as much protection to men going between the ends of cars as the grab iron or handhold?

Defendant offered to prove by means of questions to and answers from persons qualified as experts that the openings in the end sill on these cars would afford as much or more protection to men going between the ends of the cars than the grab irons or handholds. This testimony was excluded on the ground that the jurors were fully as competent to pass upon the question as experts, and that to admit such testimony would be a plain invasion of the province of the jury. The rejected testimony is referred to in the assignments of error, Nos. 1, 2, 3, 4, and 5. Was there error in rejecting this evidence? We submit there was not, for the *statute prescribes the use of a definite, ascertained, and well-known appliance* and *does not permit the use of any substitute.* This being true, the efficacy of the device in question for the protection of men going between the ends of cars is entirely immaterial and could have been ruled out as bearing no relevancy to the issue.

In its brief defendant reviews a number of cases involving railroad and train operation to show that expert testimony is admissible to assist the jury in forming a conclusion relative to a matter of which it would not be able to judge intelligently except by hearing the opinions thereon of persons possessed of

special knowledge, information, skill, or training. We make no claim that such testimony may not be received in evidence when the facts are such that persons without special skill or training are incapable of forming a correct judgment without the aid of expert-opinion evidence. But in the case at bar even on the theory on which the court submitted the case to the jury, is such testimony necessary to enable the jury to find a proper conclusion? In other words, may not the ordinary juryman ascertain for himself whether these openings would be of the same or equal assistance or help to men between the ends of cars as grab irons, in a moment of critical emergency? It seems to us a mere description of each of the appliances is sufficient to answer the proposition.

The answer sought by defendant by each of the excluded questions was called for substantially upon the very issue which the court submitted to the jury, i. e., was the device in question a substitute for and as safe for use as the ordinary handhold or grab iron?

Upon this issue full evidence was permitted on both sides in description of the form, size, and location of the appliance in question upon all the facts upon which a conclusion could properly be drawn as to the safety of the device in question.

The jury was also permitted to have a view of cars with a regular handhold or grab iron thereon and cars with the device used by defendant on the cars in question.

Jurors had the opportunity to fully examine these appliances and apply to the very device in question

all the evidence bearing thereon. They had the opportunity to measure if they desired the distance of the location of the defendant's device from the position a man would be in who was coupling air hose.

They had the evidence of their own senses on the question whether defendant's device could be grabbed or held by a man's hand.

Therefore there was no error in excluding so-called expert testimony as to comparative safety of the device prescribed by the statute and a device not intended to comply therewith.

That which Congress prescribed was a handhold or grab iron. The device used was not a grab iron or handhold.

The device in question is a mere depression or hollowing out in the top of the buffer beam on either side of the car. It is 25 or 26 inches from the center of the car, about $22\frac{1}{2}$ inches in length, about $2\frac{1}{2}$ inches wide, and is $3\frac{1}{2}$ inches back from the front of the buffer. It can not be seen by a man in a stooping position. On baggage and mail cars it is not even present. (Rec., p. 49.) The resident engineer of the defendant testified that he did "not know whether the openings were constructed for any particular purpose." Defendant's superintendent said: "I never saw on a steam railroad an end sill similar to what we have on the electric railroad. I never heard anyone describe them as a handhold."

The grab iron or handhold designated by the statute and known as such among railroad men is a

bar of iron varying in length projected from the car a sufficient distance to enable it to be easily and readily grasped by the hand.

"All handholds should be made of iron not less than $\frac{5}{8}$ inch in diameter; handholds on the sides and ends of cars should be 24 inches long in the clear, except end-sill handholds, which should be from 18 to 24 inches long." (Car Builders' Dictionary, 1909, p. 130.)

A juror may judge for himself whether a man between the ends of two cars in a stooping position to couple air hose can reach up to the top of the buffer beam, turn his wrist over the top end of the buffer, and put his fingers' ends in this opening as readily as he could grasp a slender bar of iron always within sight and easy reach, especially in an instant of crucial emergency, when every inch counts.

A man can not grasp a flat piece of iron with only a depression for the grip of his fingers as readily as he can grasp a slender bar of iron. A man can sustain himself better by clinging to a slender iron rod than he can by gripping a flat piece of iron with only a depression in it for the tips of his fingers, more especially when the depression is $3\frac{1}{2}$ inches from the front of the iron. These propositions are so elementary that they admit of no argument. There is no question here as to the operation of any mechanism.

There is no question here involving technical railroad operation. There is no question as to why it is necessary for men to go between the ends of cars.

The one and only proposition is, a man being between the ends of cars, *would the openings in the tops of the buffer beams afford him the same opportunity for saving himself from injury as the ordinary handhold, should the cars suddenly or unexpectedly start?* In such an instance a man would grab at the first thing in sight within the nearest reach which would prevent him from being dragged beneath the wheels of the cars.

Here is what defendant's own superintendent says of the situation:

> The purpose of a handhold is to afford security to a man who is between the cars if for any reason they should start. It is necessary for men to go between the cars and stoop down to connect the air hose and the electric-light and heating wires. The man who is down between the cars is within four or five inches of the ground with his hands. If the car starts, he has to reach up 37 or 38 inches from the ground to get to the top of the end sill and has to place his hand 3½ inches over the top of the sill if he reaches the opening and then turn it an inch or three-quarters before he can get enough to grab on. I would not say that he could get nothing but the ends of his fingers in if he is stooping down and suddenly has to grab to save his life, but I don't believe I could get much more than the ends of my fingers up there myself. (Rec., p. 55.)

It might very pertinently be added, too, that these openings are 25 or 26 inches from the center of the

car, an additional distance the man would have to provide for if he was engaged in coupling air hose with his hands extended to the center of the car for that purpose.

Now, whether a man could go through the procedure just outlined by the superintendent with more facility than he could reach up and grasp a slender bar of iron within sight and easily accessible we submit is not a matter for expert opinion. And sight should not be lost to the fact that defendant outlined no other method by which a man could save himself, that is, he must always reach for the opening in the same manner, from the front of the beam. But with the ordinary grab iron or handhold, there is no such limitation placed upon him. He can grasp it with equal facility, from front or back, whether the car is moving toward him or away from him. Furthermore, when in a stooping position, with the device in issue, by reason of the fact that it is on the top of the beam, the employee's chance to protect himself is diminished to the extent of the distance the opening in the top of the buffer is above where the ordinary handhold would be. Concretely stated, if the handhold were fastened to the bottom of the beam and projected 3 inches below it, it would be 15½ inches nearer to the man on the ground than the opening in the top of the beam, for the beam is 9 inches thick, the opening is 3½ inches back from the front, to which must be added the three additional inches the ordinary handhold projects below the

beam. Not only that, but a man must always reach for the opening over and around the front of the beam, whereas with the ordinary handhold or grab iron it may be grasped from any direction. To illustrate, suppose a man is working with both hands extended under the car and it suddenly lurches toward him, he must withdraw his hands at least to the front of the beam, raise them, or one of them, to the top of the beam, and then extend his fingers over the top more than 3½ inches before he can secure a clutching hold. With the ordinary handhold, all this procedure is reduced to one simple movement—reaching in a direct line for the grab iron from any direction, whether the hands be under the car and back of the buffer or in front of it.

It is not necessary that the juror be familiar with the breaking up or making up of trains, or coupling air hose, heating wires, etc. The proposition is, being between the ends of the cars for any purpose, would this opening in the end sill afford the employee an opportunity equal to or greater than the grab iron to save himself from injury? Could he make a quick grab for it and be as sure to secure a firm hold as he would in reaching for a handhold? Not being on all the cars, would he be as likely to grab for it, more especially when not in view from a stooping posture? In an instant of emergency an employee has no time to think whether the car is a baggage car or a coach before he grabs. This is the proposition the jury had to decide. Which of these devices

would avail a man whose life is in jeopardy the greater service as a protection? This is a simple issue, not involving the workings of intricate mechanisms or technical railroad operation and can be decided by a juror upon a view without special training fully as well as by men possessed of long years of experience in railroad work or car construction.

It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is permitted to testify. That which is plain ought not to be complicated by the ever-present difficulties which exist when expert evidence is received.

The governing rule deduced from the cases permitting the opinions of witnesses is that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exists in reasons rather than descriptive facts, and therefore can not be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it. (17 Cyc., 41, et seq., and cases cited.)

Now, what is there of science, skill, training, or experience involved in this controversy as to which of two appliances can be most readily grasped by the hand?

May not any man from a description of the appliances judge for himself which can be more readily grasped firmly and securely, and may he not also

judge for himself which is the more convenient location for the purposes described?

> When all relevant facts can be or have been introduced before the jury, and the latter are able to deduce a reasonable inference from them, no reason exists for receiving opinion evidence, and it is inadmissible. (17 Cyc., 41, and cases cited.)

Following this rule, attention may be called to the case of *Baldwin* v. *St. Louis, K. & N. Ry. Co.* (68 Iowa, 37; 25 N. W., 918), where it was held that the opinion of a witness as to how high a pile of lumber that fell and injured plaintiff should have been piled is not admissible, for piling lumber requires no such technical knowledge or skill as to make it a proper subject for expert testimony.

In an action on the case for running over a child in a street with a horse and wagon (*Brink's Express Co.* v. *Kinnare*, 168 Ill., 643; 48 N. E., 446) the court sustained an objection to the following question asked by appellant of a witness called in its behalf:

> If the driver had seen the boy there do you think he could have stopped in time to avoid the accident?

Court said:

> The question was clearly improper as calling for a mere opinion of the witness upon a matter not the subject of expert testimony. * * * It was for the jury to find from all the evidence and not for the witness to say what he thought about it.

In the case of *I. C. R. R. Co.* v. *People*, 143 Ill., 434; 33 N. E., 173, it was held:

> One of the witnesses of the company upon the trial below, who was an assistant of appellant's second vice president, was asked the question whether the fast mail train was a regular passenger train, but upon objection made, was not allowed to answer. The refusal of the court to permit him to answer is claimed by the appellant to have been erroneous, but we think the ruling of the trial judge was correct. The witness was asked to decide the very question which the court trying the case without a jury was called upon to decide. A witness is not permitted to give his opinion as an expert in reference to a matter which does not involve a question of science, skill, or trade. To determine whether a train is a regular passenger train is not a subject which "so far partakes of the nature of science as to require a course of previous habit or study in order to the attainment of a knowledge of it." (*Linn* v. *Sigsbee*, 67 Ill., 75; *Fireproofing Co.* v. *Poczekai*, 130 Ill., 139; 22 N. E. Rep., 543.) The opinions of witnesses should not be asked in such a way as to cover the very question to be found by the jury or court. (*Chicago & A. R. Co.* v. *Springfield & N. W. R. Co.*, 67 Ill., 142.) Where the matter inquired about requires no special knowledge and may be determined by a jury upon a sufficient description of the facts in regard to it it is not proper to receive the testimony of experts. (*Hopkins* v. *Railroad Co.*, 68 Ill.,

32; *City of Chicago* v. *McGiven.*, id., 347; *Pennsylvania Co.* v. *Conlan*, 101 Ill., 93.)

The cases on the point are extensive. but we deem it unnecessary further to burden the court with additional citations, since the rule is well established and incontrovertible. Defendant has reviewed a number of decisions in support of its contention, but it will be observed that they all involve some question of skill, science, trade, or "knowledge not common to the world," such as train operation, car construction, workings of mechanisms, etc.

Defendant emphasizes *Wabash, etc., Co.* v. *United States* (168 Fed., 1) as a "strictly analogous case." From that case defendant quotes as follows:

> An expert trainman, after describing the broken condition of a coupler, was asked:
>
> "In the condition in which that coupler was on that end of the car at that time, what was necessary in order to operate the coupler?"
>
> He answered:
>
> "It would necessitate a man going between the ends of the cars and taking the part of the chain that was left with the coupler to operate that coupler."
>
> The question was objected to on the ground that it called for a conclusion and invaded the province of the jury. In our judgment the mode of operation of automatic coupling mechanism and the effect of various conditions thereof were proper subjects for expert testimony.

Thus it will be seen the question was, What was necessary to operate the coupler—a mechanical device? In explaining a mechanical invention or device to a layman not versed in mechanics after the mechanism is described and explained, it is necessary to show how it is operated. Without such explanation the description is incomplete. The court said, "in our judgment the mode of operation of automatic coupling mechanism and the effect of various conditions thereof were proper subjects for expert testimony." It is not at all difficult to draw a distinction between that case and the one at bar, for in the one there is the question of the operation of mechanism and the effect produced by it under various conditions, whereas in the other the simple question is, Can a man secure a firm grasp of it readily and as quickly as he could with another device? There is no similarity between the cases whatsoever. There is no question of skilled work involved, and the man who for years has been engaged in it does not possess any peculiar knowledge or information not common to the world which would render his opinion founded on such knowledge or experience of any more consequence than that of the juror not skilled or experienced in railroad work.

The defect in the questions which were excluded and in the offer of proof is that no evidence of any of the *elements* constituting safety was offered, no *facts* upon which a conclusion of greater safety in the device in question could be based, but the *naked conclu-*

sion of the witness was asked upon the precise issue which the court submitted to the jury as determinative of the case.

In *Union Pacific Ry. Co.* v. *Novak* (61 Fed., 573), cited in defendant's brief at page 54, the court says:

> *If the relation of the facts* and their *probable result* can be determined without special skill and knowledge, the *facts themselves must be given in evidence* and the *conclusions or inferences* must be drawn by the jury.

While there are cases in which it is proper to ask for the conclusion of competent experts upon the question which is the issue for the jury, such as insanity and the like, yet there ought to be a reasonable discretion in the trial court to determine whether or not on the particular case made by the record there is a necessity for expert aid in the solution of the issue. Conflicting views of experts ought not to be invited where, in the opinion of the trial court, the plain evident facts do not justify it, and where the tender of the expert evidence is limited to the precise issue to the jury, the exercise of the trial court's discretion in excluding such evidence ought not to be disturbed.

In this case there was no prejudicial error, for the statute specifically requires a handhold. These cars had none. Whether something else was just as good as what Congress had prescribed was not open. Railroads can not *substitute* for what the statute absolutely requires. The court might well have ruled as a matter of law that the device described by defend-

ant's witnesses was not a handhold or grab iron and there would have been no error in such ruling.

As to the three counts in which the defendant is charged with using cars with the link-and-pin coupler in interstate passenger trains, the evidence in the record established these allegations, and upon the undisputed evidence the Government was entitled to the ruling made.

We submit therefore that the defendant has not been prejudiced by reason of any of the rulings of the trial court.

Respectfully submitted.

OSCAR CAIN,
United States Attorney.
PHILIP J. DOHERTY,
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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Spokane & Inland Empire Railroad Company, Plaintiff in Error,

vs.

United States of America, Defendant in Error.

Error to the District Court of the United States for the Eastern District of Washington

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REPLY BRIEF FOR PLAINTIFF IN ERROR

I.

Inapplicability of the Safety Appliance Act to the Cars in Controversy.

We have never at any time questioned that the Safety Appliance Act is a remedial statute, intended to render

less hazardous the dangerous occupation of railroading, and that being such it must receive a liberal construction in order that there may be accomplished all that which Congress intended to accomplish. But it must be borne in mind that Congress in enacting this remedial statute has seen fit to make exceptions to it. The intent of Congress in making such exceptions is entitled to the same respect as its intent in enacting the statute, and such intent must be ascertained by the same means in the one case as in the other. That is all we insist upon.

Whether the Safety Appliance Act is applicable to the cars in question does not depend, as plaintiff's counsel seem to suppose, upon the nature of its line of railway; upon whether it falls within one or the other of the "three general classes of railroads, *viz.;* street railroads, steam railroads, and interurban electric railroads" referred to in plaintiff's brief. Congress did not in the Safety Appliance Act legislate concerning classes of railroads and make the act applicable according to class. The original act was made applicable to "any common carrier engaged in interstate commerce by railroad." The amendment made by the Act of 1903 extended it to apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives,

tenders, cars, and similar vehicles used in connection therewith, excepting,'' etc. Now, as said by the Supreme Court in *Omaha etc. Co. v. Interstate Commerce Commission* (decided June 9, 1913), whether the word ''railroad,'' when used in a statute, includes street railroads ''is to be determined by construing the statute as a whole.'' The court determined by a very convincing process of reasoning that street railroads were not within the purview of the Commerce Act, saying:

> ''When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between states,' 'between states and territories,' 'between the United States and foreign countries.' The act referred to railroads which were required to post their schedules—not at street corners where passengers board street cars, but in '*every depot, station or office where passengers or freight are received for transportation.*' The railroads referred to in the act were not those having separate, distinct and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce.''

The same course of reasoning which is employed in the case just referred to would, if applied to the Safety Appliance Act, require that the word ''railroad'' used

there should include street railroads. "Street railroads not being guilty of the mischief sought to be corrected," said the Supreme Court in the *Omaha* case, "it is evident that the case is within that large line of authorities which hold that under such a statute the word railroad cannot be construed to include street railroad." But street railroads are guilty of the mischief sought to be corrected by the Safety Appliance Act. The same reasons which impelled Congress to provide that trains running between Omaha and Council Bluffs on the Union Pacific Railroad should be equipped with power brakes and the cars making up such trains should be fitted with automatic couplers and sufficient hand-holds, might be supposed to impel Congress to require that trains running between the same points on the street railway line connecting them should have been similarly equipped and fitted.

> "When these street railroads carry passengers across a state line, they, are, of course, engaged in interstate commerce."
>
> *Omaha* case, *supra.*

It is clearly, then, within the power of Congress to legislate concerning the traffic of such lines, and the prohibitory language of the sections referred to is broad enough to apply to street railroads as well as to all others. But here come in the exceptions, and to them solely must we look to see what is excepted from the

operation of the act, because save for the exceptions the act is sweepingly declared to apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting," etc.

When it comes to a consideration of the exceptions and their scope, plaintiff's counsel are again in confusion as to what is dealt with. The exception is not of any *class of railroad* from the operation of the act. The exception is of trains and cars of a particular style or used for some particular purpose, wholly regardless of what sort of a railroad they are run over. The exception in the original act was "*Provided,* that nothing in this act contained shall apply to trains composed of four-wheeled cars or to locomotives used in hauling such trains." This was amended in 1896 to read, "*Provided,* that nothing in this act contained shall apply to trains composed of four-wheeled cars, or to trains composed of eight-wheeled standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains, when such cars or locomotives are exclusively used for the transportation of logs."

It is quite obvious, of course, that the locomotives, cars, and trains of the types above enumerated, or used

for the purpose above specified, might be used on any railroad; the Northern Pacific, the Great Northern, the Southern Pacific, or any other transcontinental line, along with the locomotives, trains, and cars used for the carriage of transcontinental freight and passengers, and yet not be subject to the provisions of the act. For some reason satisfactory to itself, and with which the courts have no concern, Congress, while enacting this remedial statute, chose to take out from its operation certain types of cars, or cars which are used for a particular purpose, no matter though they were engaged in interstate commerce, and though running upon a strictly interstate road.

The same considerations which led Congress originally to except certain types of cars, trains and locomotives from the operation of the act, led Congress in 1903, when greatly extending the operation of the act in other respects, so that it should apply not only to vehicles used in interstate commerce, but also to those used "in the territories and the District of Columbia," and to all similar vehicles used in connection with the commerce therein referred to, to still further extend the exception. So it was there provided that the act should apply "to all trains, locomotives, tenders, cars, and similar vehicles used," etc., but excepting therefrom "those trains, cars, and locomotives exempted by the provisions of §6 of said act of March 2, 1893, as amended by the

act of April 1, 1896, or which are used upon street railways." Considering all these exceptions together, it becomes apparent that whatever reason prompted Congress to make them, it was not because the operation of the excepted vehicles was less hazardous to passengers or employes than that of vehicles which were not excepted. Four-wheeled cars and eight-wheeled cars exclusively used for the transportation of logs must be coupled together into trains and to the locomotives hauling them, and automatic couplers and sufficient hand-holds are as desirable for the safety of employes working about such cars and trains as they are for the safety of employes working about any other sort of train. A passenger train on the Union Pacific Railroad running between Omaha and Council Bluffs runs out of its station in one city and runs to its station in the other over its private right of way, probably with no stops between. Trains running over the street railway lines between the same points pass along the surface of the streets and are required to make frequent stops and are constantly exposed to the danger of collision with other vehicles using the streets. Surely the need of power brakes which can quickly stop the trains is greater on the street railroad trains than on the steam railroad trains, yet it can hardly be contended that the Safety Appliance Act is operative over the street railway trains, for certainly they must be conceded to be

trains which are "used upon street railways." It would seem, then, that if there is any frittering away of the "undoubted humanitarian purpose" of the act through the operation of these exceptions, the blame should be laid not upon any dreaded "judicial interpretation," but upon Congress, which has seen fit to make the exceptions.

The consideration of these exceptions should be approached, then, with the single purpose of discovering from the act, considered as a whole, just what it was that Congress intended to except therefrom. The courts should not be concerned with their own views as to the wisdom or unwisdom of the exceptions, nor should they fear any criticism of their interpretation of the act as a frittering away of the act. Congress has seen fit to make these exceptions. The language employed in the exceptions is plain. Whenever Congress is convinced of the unwisdom of the exceptions, no doubt it will amend the act so as to eliminate them and leave the body of the act to cover the whole subject matter. But until it has done so, it merely rests with the courts to ascertain the intent of Congress.

Congress has said that the act shall apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives, cars, and similar vehicles used

in connection therewith, except those trains, cars and locomotives exempted * * * or which are used upon street railways." Congress did not except from the operation of the act street railway *lines*. Neither did it except cars "which are exclusively used upon street railways," nor cars "while being used upon street railways," nor cars "which are used exclusively in street railway traffic." With respect to its other exceptions it has provided that the excepted cars, trains, etc., must be such as are "exclusively used for the transportation of logs." The language here relied upon is much broader. Those cars are excepted "which are used upon street railways." That language, of course, can not be stretched to cover the absurd hypothetical cases suggested by plaintiff's counsel. Neither, undoubtedly, could it be stretched to cover the case of cars taken temporarily out of street railway service and placed upon an interstate run, no part of which was over street railway lines. But it does cover unquestionably, we think, such a case as is here presented. We must keep in mind the precise language of the act. The act is made applicable to every sort of a vehicle used on a railroad engaged in interstate commerce save such as are used (so far as this action is concerned) "upon street railways." It seems too plain for argument. An integral, essential part of each trip which the cars in question make is over a street railway line. In order that they may be used

upon the interstate highway for the transportation of interstate traffic, they must be used upon a street railway, for in no other way can they gain access to or leave the City of Spokane. How can it be said that this is not a use of street railway lines? And if it is a use of such lines, why are not the cars "used upon street railways" within the very words of the act? While we grant that the exception may not legitimately be held to cover cars and trains which do not use street railway lines, in part at least, for their interstate runs, we deny that the language of the exception can be so restricted as to cover only such vehicles as are exclusively used upon street railway lines, or exclusively used for street railway traffic. It cannot be so restricted for two very good reasons. The first is that Congress, by the use of the word "exclusively" in the former exception relating to cars used for the transportation of logs, showed that it understood the meaning of the word. How very easy it would have been for Congress, if it intended the exception to apply only to street cars or cars and trains exclusively used upon street railway lines, or exclusively used for street railway traffic, or while in use upon street railway lines or for street railway traffic, to have said so in common English language. The second reason why it may not be so restricted is that it is a palpable thwarting of Congressional intent to so construe the exception. There can be no doubt that by this particular exception

Congress intended to cover exactly such cases as the Omaha and Council Bluffs street railway line and other similar lines passing from a city in one state to a near-by city in another state. Cases are numerous in the United States where a river is the dividing line between states and considerable cities have grown up on each side of the river. These are always connected, at the present day, by electrically operated lines, cars and trains upon which cross by a private right of way and bridge from the one side to the other, and reach the business portions of the cities over street railway lines. If there be read into the exception here that only such cars and trains shall be excepted as are exclusively used upon street railway lines, then the cars and trains of those roads will be within the act, for that is not a street railway line which makes use of its private right of way. The very term imports a line which is laid upon the public streets.

Again, it must be presumed that Congress made this exception to the act after consideration and for some cause which appealed to it as founded upon reason. Can any reason be suggested why trains and cars which are exclusively used upon street railway lines should be excepted from the operation of the act, and not those which are used for a part of their interstate run upon such lines?

Much is made of the fact that in the case at bar street

railway lines are used for a comparatively inconsiderable portion of the interstate run. Whether the use be considerable or inconsiderable is a wholly immaterial factor in the matter. Either Congress intended, as we claim, to except from the operation of the act such cars and trains as are used for any part of their interstate run upon street railway lines, or it intended, as plaintiff's counsel contend, that only cars and trains which are exclusively used upon street railway lines should be excepted. In either case, then, it is quite immaterial what relation the distance of the run over street railway lines bears to the run over the company's private right-of-way. The important thing is that in the case at bar the interstate journey would not be made, or interstate traffic could not be moved, but for the running of the cars over street railway lines, the use of the cars upon street railway lines. So far as the reason of the thing and the language of the statute are concerned, it can matter nothing that the length of the run upon one line is less than the length of the run upon the other.

We have no intention of following plaintiff's counsel through their discursive argument concerning the merits of the Safety Appliance Act and the great evils which will result if defendant's cars be held exempt from its provisions. We grant all that is said of the beneficent purpose of the act. We merely say that Congress has seen fit to make certain exceptions from its operation.

One of those exceptions covers the cars in question in this action, unless there shall be written into the act words which, while Congress has seen fit to use them in the other exception, were omitted here. We believe the courts have no such power, but must enforce the exception as it is written until Congress sees fit to change it.

II.

Are the Openings in the Buffer Beams Sufficient Hand-Holds?

As pointed out in our opening brief, the cars in question have rounded buffer beams at each end. Over these buffer beams and extending back to the body of the car, is an iron plate. On each side of the coupler on each end of the car is an opening in this angle iron 22½ inches long, 2½ inches wide, and back from the edge of the sill about 3½ inches. We contended that these were sufficient hand-holds under the provisions of the act, and offered expert evidence to prove that they were sufficient for that purpose. Now, if we correctly understand plaintiff's counsel, it is claimed such evidence was properly rejected because the statute has fixed the nature of the hand-hold with which cars amenable to the operation of the act must be equipped, and it is not permissible to rely upon any substitute therefor. The contention is, in other words, as we understand it, that what is a hand-hold is a question of law and not one of fact.

That contention is shown by the very language of the section which provides for the fitting of cars with hand-holds to be unsound. Section 4 of the act provides that "it shall be unlawful for any railroad company to use any car in interstate commerce that is not fitted with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." Now, first we have a specific declaration of Congress that the purpose of this requirement is "greater security" to employes. In the fact of this declaration, it certainly would not be for the courts to say that only one type of appliance would tend to the accomplishment of the Congressional purpose. But there is more than that in the section in question. Congress has said that the grab-irons or hand-holds which are provided must be "secure." Does not this provision make the question of what is or what is not secure one of fact in every case? How, under such language, may the courts decide, as a question of law, what is or is not secure in the way of a grab-iron or hand-hold? Furthermore, what is there to guide the court to the end of determining, as matter of law, what is or what is not a secure grab-iron or hand-hold? Evidence was introduced, it is true, showing that on steam railroads a certain type of grab-iron or hand-hold was commonly employed. There was no evidence, however, that there is one and only one type of secure grab-iron or hand-hold. On the contrary, the

defendant's superintendent testified that prior to the Interstate Commerce Commission being given power to prescribe the type of grab-iron or hand-hold that should be used, there was no uniformity in the grab-irons or hand-holds that were placed upon the cars with respect to use, location or anything of the sort (Record, p. 52).

Robertson, a conductor on the Great Northern Railroad, testified that in a general way there was uniformity in such appliances and the place of their location, but that the coaches had hand-holds on the ends of the cars and no strips, while the baggage cars had strips and no hand-holds on one side of the draw bar, and that where there was a hand-hold on passenger coaches it was about midway from the bottom of the sill to the bottom of the car above the track (Record, p. 56).

Now we admit that since the Interstate Commerce Commission, exercising the power conferred upon it in that behalf by Congress, has fixed the style of hand-hold which shall be used, that there is a prescribed standard which must be lived up to. That standard, however, cannot be relied upon here, for the acts complained of for cause of action occurred before the Interstate Commerce Commission had fixed the standard, or at least had made it applicable to defendant's road. We are left, therefore, to determine whether or no these cars were quipped with secure grab-irons or hand-holds to the definition of such appliances given by the act. It is obvious that if the

language of the act alone be relied upon, what is a proper grab-iron or hand-hold, sufficient to satisfy the requirements of the act, is a question of fact unless there is a commonly understood and accepted definition of the appliance which will not permit of any but one meaning being given to the term. Counsel, while contending in portions of their brief that whether the appliances on the cars in question were or were not sufficient grab-irons or hand-holds was a matter of lay knowledge, upon which one man was as capable of forming an opinion as another, yet have favored us, for the purpose of establishing that nothing but a technical hand-hold would satisfy the requirements of the act, with a definition of that term taken from some work which they entitle the "Car Builders' Dictionary of 1909." We submit that if there is such a thing known to car builders or railroad operatives as a hand-hold, and if it has a technical, definite and fixed meaning, in the place of which nothing else could be supplied, that the time and place to establish that was at the trial by the introduction of evidence relating thereto. The Car Builders' Dictionary is probably a standard text-book for car builders, but judges and jurymen have no technical knowledge of that sort. Judges and jurors will be supposed to know the meaning of the words as Webster's dictionary, or any other standard dictionary, gives them. Referring to Webster's International, we find the word "hand-hold" to be: "1. A

hold or grip with the hands; something for the hand to hold onto, as in climbing. 2. The part of an implement that is especially fashioned to be held in the hand." The word "grab-iron" is nowhere to be found. We take it, then, that the word "hand-hold," as it is used in the act, must have been used in the first sense given above, as a place for "a hold or grip with the hands; something for the hand to hold onto, as in climbing." It would certainly seem, therefore, that it is not the province of the courts to declare, as matter of law, what is a secure grab-iron or hand-hold within the meaning of the statute. Certainly it is not the province of the courts to so declare in the absence of proof that the words "grab-iron" and "hand-hold" have some technical meaning, and that nothing less than the appliance that satisfies that meaning can be accepted as within the act.

It has been held that any appliance which the jury may find, as matter of fact, to serve the purpose of the act and accomplish that which was intended by Congress, is a sufficient compliance with the act.

United States v. Boston, etc. Co., 168 Fed., 148.

We have found no authorities to the contrary.

III.

Rejection of Evidence as to the Sufficiency of the Hand-holds on the Cars in Question.

It seems to us that plaintiff's counsel have gone far in arguing the admissibility of this evidence for us. Page

after page of their brief is taken up with statements as to the purpose of hand-holds or grab-irons, as to whether any substitute therefor could accomplish the same purpose which they would accomplish, and particularly whether the appliances in use on defendant's cars would serve the purpose of the act. All this, if it tends to establish anything, tends to establish that if the words "grab-irons" or "hand-holds" used in the act have not a technical meaning which must be declared as a matter of law, and which can be satisfied only by the use of that which, as matter of law, the statute requires, that then whether any appliance is a sufficient compliance with the act is a question of fact. The statute has said that these appliances shall be "secure." Who shall determine the security of the appliance? Why, plainly, the jury who are required to pass upon the issues of fact in the case. And if the jury are to pass upon that issue of fact, why shall not the jury have the testimony of the very men who have to use these appliances as to whether they are or are not secure to aid them in reaching a correct conclusion? No doubt plaintiff's counsel, among their many accomplishments, are thoroughly versed in the science of railroading. One has but to read the discussion with which they have filled pages of their brief as to the insecurity of the appliances in question to know that they feel themselves competent to pass upon all questions of the sort. It can hardly be supposed that mere ordinary jurymen

are possessed of the versitality which these gentlemen possess, and, taken from the plow, the work-shop and the counter, they can hardly correctly determine whether or not men who are working about cars and trains would feel that the appliances in question were or were not secure. It was for the very purpose of aiding in the determination of the question which the statute has said that the jury must settle, *viz.*, whether these appliances were or were not secure, that we offered the evidence in qustion. We placed upon the witness stand railroad operatives thoroughly experienced in the handling of trains, knowing exactly what were the dangers against which hand-holds are intended to give protection, and inquired whether in their opinion these hand-holds were or were not secure. We went even further than that, for in the case of the witness Mahan we showed that he had had occasion to couple and uncouple these cars (Record, p. 58), that he had had occasion in his railroad experience to use a grab-iron as a life saving device when he was between the cars coupling an air hose when the train was started, and that it was one of the Inland cars in the yards of that company where he had that experience (Record, p. 61). He testified, also, that the men used these appliances for grab-irons whenever they had occasion to couple or uncouple cars or to go between them (Record, p. 58). And yet this witness, with the experience not only of the expert railroad man, but with the

actual experience of the use of these appliances, was held incompetent to throw any light upon the question of the security of the appliance under discussion, and that his opinion with respect thereto could be no guide to the jury in determining whether or not such appliances were secure, as the statute has required them to be.

Such a ruling can be justified only on the theory that the business of railroading and the handling of railroad cars and trains in the many ways in which men must go about them is a business which one man is as competent to do as another, and concerning which one man knows as much as another. Common experience, and the fact that Congress and the legislature of substantially every state in the Union has seen fit to legislate so much concerning the hazards of that occupation, denounces any such theory as fundamentally unsound. Reference to the decisions cited in our opening brief show with what unanimity the courts, and among others this court, have declared against such a theory, and have held that in dealing with dangerous occupations, and particularly the most dangerous occupation of railroading, questions in connection therewith are matters of expert knowledge concerning which jurors are entitled to the opinions of those having experience and particular information upon the subject. We refer to those cases as establishing the error here with the utmost confidence.

Respectfully submitted,

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